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IN THE

# United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9620

WILLIAM I. CONNELLY AND BERTHA CONNELLY,
*Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

**On Petition for Review of Decision of the Tax Court of the United States.**

## JOINT APPENDIX.

1 **Docket Entries.**

1946

Mar. 22—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 22—Copy of petition served on General Counsel.

Mar. 22—Request for hearing at Washington, D. C. filed by taxpayer. 4/2/46 granted.

Apr. 24—Answer filed by General Counsel.

Apr. 25—Copy of answer served on taxpayer, Washington, D. C.

Aug. 21—Hearing set Oct. 28, 1946, Washington, D. C.

Oct. 28—Hearing had before Judge Leech on merits. Ordered submitted. Stipulation of facts filed at hearing. Petitioner's brief due Dec. 9, 1946; Respondent's brief due Jan. 18, 1947; Petitioner's reply due Feb. 8, 1947.

Nov. 6—Transcript of hearing 10/28/46 filed.

Dec. 9—Brief filed by taxpayer (2). Copy served by attorney.

Dec. 20—Stipulation to correct the transcript filed.

1947

Jan. 21—Motion for extension to Feb. 3, 1947 to file brief filed by General Counsel. 1/21/47 Granted and petitioner to 2/24/47 for reply.

Jan. 23—Brief filed by General Counsel. Served.

Feb. 21—Reply brief filed by taxpayer. 2/24/47 Copy served.

Apr. 21—Findings of fact and opinion rendered, Judge Leech. Decision will be entered for respondent. Copies served.

Apr. 22—Decision entered, Judge Leech, Div. 6.

May 20—Motion for leave to withdraw as counsel (William E. Koken) filed.

May 20—Entry of appearance of Caesar L. Aiello as counsel filed.

May 20—Motion for rehearing and for reconsideration filed by taxpayers. 5/22/47 Denied.

Jul. 16—Stipulation as to venue filed.

Jul. 16—Petition for review by U. S. Court of Appeals for the District of Columbia filed by taxpayers.

Jul. 16—Statement of points filed by taxpayers.

Jul. 16—Designation of record filed by taxpayers.

Jul. 16—Proof of service of petition for review, statement of points and designation filed.

• • • • • • • • • •

**Petition.**

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols 1942-284286, 1943-355980, 1944-7161500) dated February 26, 1946, and, as a basis of their proceeding, allege as follows:

1. The petitioners are husband and wife residing at 531 West Great Falls Street, Falls Church, Virginia. The returns for the periods here involved were filed with the Collector for the District of Virginia.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitoners on February 26, 1946.

3. The taxes in controversy are income taxes for the calendar years 1943 and 1944. The deficiencies asserted are as follows:

| | |
|---|---|
| 1943 | $433.59 |
| 1944 | 227.10 |

making a total of $660.69, all of which is in controversy.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

3 (a) The Commissioner erred in disallowing as an exclusion from the income of the petitioner William I. Connelly for the taxable years 1943 and 1944 as authorized by law the additional annual allowance of $1,500 provided by law for military and naval personnel.

(b) The Commissioner erred in disallowing as a deduction from the income of the petitioners for the taxable year 1943 as authorized by law the sum of $75 from the petitioners' allowable deduction for medical expenses of $134.65.

(c) The Commissioner erred in disallowing as an exclusion from the income of the petitioner William I. Connelly for the taxable year 1944 as authorized by law the sum of $2,171.10 as allowances for quarters and subsistence.

5. The facts upon which the petitioners rely as the basis of their appeal are as follows:

(a) The petitioner William I. Connelly was enrolled under section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, as a temporary member of and performed full-time active service and duty in the Coast Guard Reserve in the ranks of Lieutenant Commander and Commander during the taxable years 1943 and 1944. The said petitioner was enrolled for such active service and duty without pay other than the compensation of the civilian position which he held in the United States Coast Guard on the date of his enrollment, and the said petitioner continued to receive such compensation during the period of his enrollment the duration of which was from February 19, 1943 to September 15, 1945.

4 The petitioners assert that by virtue of the enrollment of the petitioner William I. Connelly for and performance by him of full-time active service and duty he was a member of and performed full-time active service and duty in the military or naval forces of the United States during the taxable years 1943 and 1944; that he was not in a civilian status during the period of his enrollment; that the compensation which he received from the United States during the period of such active service and duty in such forces was received for and in respect of such active service and duty within the meaning of and as provided by section 22(b)(13), as amended, of the Internal Revenue Code, and Regulations thereunder; and that the petitioners are therefore entitled to exclude from such compensation for the taxable years 1943 and 1944 the additional annual allowance of $1,500 provided by the said provision for military and naval personnel.

(b) Medical expenses incurred by the petitioners for the taxable year 1943 exceeded 5% of their net income for that period by $134.65, and are therefore deductible by the said petitioners in that amount as authorized by law.

(c) The petitioners further assert that the compensation received by the petitioner William I. Connelly from the

United States during the taxable year 1944 during and for full-time active service and duty in the military or naval forces was in lieu of the pay and allowances provided by the Pay Readjustment Act of 1942, as amended, for the ranks held by the said petitioner, and which would have been otherwise payable to him, and that the petitioners are therefore entitled to exclude from such compensation an amount which equals the allowances for quarters and subsistence provided by law for the ranks held by the petitioner William I. Connelly.

Wherefore, the petitioners pray that this court may hear the proceeding and disallow the deficiency as asserted by the Commissioner, and determine the amount of the overpayment made by the petitioners for the years 1943 and 1944, and that the court may grant such other and further relief as the nature of the case may require.

William E. Koken,
WILLIAM E. KOKEN,
432 Shoreham Building,
Washington 5, D. C.
*Attorney for the Taxpayers*

DISTRICT OF COLUMBIA: SS:

William I. Connelly and Bertha Connelly, being duly sworn, say that they are the petitioners above named; that they have read the foregoing petition, or had the same read to them, and are familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those they believe to be true.

William I. Connelly
WILLIAM I. CONNELLY

Bertha Connelly
BERTHA CONNELLY

Subscribed and sworn to before me
this 21 day of March, 1946.
FRANCIS B. MYERS

6 EXHIBIT "A"

Treasury Department
Internal Revenue Service
Richmond, Va.

February 26, 1946

Office of the Collector
District of Virginia
Parcel Post Building
Address reply to Collector
of Internal Revenue and
refer to

1942——284286
1943——355980
1944——7161500

William I. Connelly, Commander, U.S.C.G.R. and
Mrs. Bertha Connelly
531 West Great Falls Street
Falls Church, Virginia

Dear Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year(s) 1943 and 1944 discloses a total deficiency of $433.59(1943) $227.10(1944) $660.69, as shown in the statement attached.

In accordance with the provisions of existing Internal Revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may fil a petition with the Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed Form and forward it to the Collector of Internal Revenue, Richmond, Virginia, for the attention of IT:AUDIT. The signing and filing of this form will

expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the Form, or on the date assessment is made, whichever is earlier.

Respectfully,

Jos. D. Nunan, Jr.,
*Commissioner*

By N. B. Early, Jr.
*Collector*

Enclosures:
Statement
Form of Waiver

Copy

January 31, 1946

IT:AUDIT:FEM:EHS
1943——355980

William I. Connelly, Lt. Comdr., USCGR
Mrs. Bertha Connelly
531 West Great-Falls Street
Falls Church, Virginia

Dear Commander and Mrs. Connelly:

Preliminary audit of your 1943 income and victory tax return discloses that you have excluded from gross income for 1943, $1500.00, the special allowance granted members of the armed forces for active service.

As stated in letter addressed to you relative to your 1944 income tax return, when a temporary member of the Coast Guard Reserve receives no compensation except that from civilian sources or from a civilian government payroll, such compensation is regarded as not being remuneration for services as a member of the military of naval forces of the United States for active service in such forces within the intendment of Section 22(b)(13) of the Internal Revenue

Code as amended. Accordingly he may not exclude from gross income $1500.00 of his civilian pay.

Since Commander Connelly was in civil status in 1943 and received his compensation from a civil service civilian payroll the entire amount of such income is taxable.

Since there is an increase in income and since medical expense is deductible only to the extent of the excess of the total expense over 5% of the net income without the benefit of this deduction, allowable deduction for medical expense is reduced from $134.65 to $59.65, disallowance being made of the difference of $75.00.

Recomputation follows:

IT:AUDIT:FEM:EHS
1943—355980

Wm. I. Connelly &
Mrs. Bertha Connelly

| | | |
|---|---|---|
| Net Income shown on return | | $5688.38 |
| Plus: Excluded in error | | 1500.00 |
| Disallowance | | 75.00 |
| Income tax net income adjusted | | $7263.38 |
| Less: Personal exemption | $1200.00 | |
| Credit for dependents | 700.00 | 1900.00 |
| Balance subject to surtax | | $5363.38 |
| Less: Earned income credit | | 726.34 |
| Balance subject to normal tax | | $4637.04 |
| Normal Tax | | $278.22 |
| Surtax | | 852.68 |
| Income tax for 1943 | | $1130.90 |
| Victory tax net income shown on return | | $6509.83 |
| Plus: Excluded in error | | 1500.00 |

| | | |
|---|---|---|
| Victory tax net income adjusted | | $8000.83 |
| Less: Specific exemption | | 1248.00 |
| Balance subject to victory tax | | $6761.83 |
| Victory tax before credit | $338.09 | |
| Less: Victory tax credit (44%) | 148.76 | |
| Net victory tax | | $189.33 |
| Plus income tax for 1943 (brought forward) | | 1130.90 |
| Total income and victory tax for 1943 | | $1320.23 |

Since this amount is larger than your 1942 tax of $536.91, the total liability is the sum of the 1943 tax and one fourth of the 1942 tax.

| | | |
|---|---|---|
| 1943 tax | | $1320.23 |
| Plus: 1/4 of $536.91 | | 134.23 |
| Total tax | | $1454.46 |
| Less: Tax withheld | $740.23 | |
| Tax paid on 1942 income | 134.23 | |
| Payment on Declaration of Estimated Tax | none | $874.46 |
| Balance of tax | | $580.00 |
| Less: Tax previously assesed | | 146.41 |
| Increase | | $433.59 |

Remittance for this amount plus interest at 6% per annum from 3 15 44 to date of payment should be forwarded for attention file symbols this letter.

Yours very truly,

N. B. Early, Jr.
*Collector*

9 Copy

January 31, 1946

IT:AUDIT:FEM:EHS
1944——7161500

William I. Connelly, Commander, USCGR &
Mrs. Bertha Connelly
531 West Great Falls Street
Falls Church, Virginia

Dear Commander and Mrs. Connelly:

Reference is made to your 1944 income tax return on which refund of $715.60 is claimed.

Examination of the return discloses that you have excluded from gross income $1500.00, special allowance granted members of the armed forces for active service and $2171.10 equivalent of rental and subsistence allowances to members of the armed forces.

Your return with several others was transmitted to the Bureau of Internal Revenue for a specific ruling with respect to your status since the Bureau had ruled that generally "where an individual enrolls for active service without pay or allowances other than military allowances and receives pay from civilian sources or from a civilian government payroll, such compensation is regarded as not being remuneration for services as a member of the military or naval forces of the United States for active service in such forces within the intendment of section 22(b)(13) of the Internal Revenue Code, as amended. Accordingly he may not exclude from gross income $1500.00 of his civilian pay. Any allowances for quarters, subsistence, uniform, etc., actually received by him from the Coast Guard by reason of his active service therein should be excluded from gross income for Federal income tax purposes.

With respect to Commander Connelly specifically, the Bureau states that it has been advised by the Navy Department to the effect that he served in a civil status and received civil service civilian pay and that he did not re-

ceive from the Navy either cash or other allowances for rental or subsistence.

Since Commander Connelly is in civilian status he is not eligible for the special benefits allowable to members of the armed forces for active service and his entire compensation as a temporary member of the Coast Guard Reserve is taxable.

10 IT:AUDIT:FEM:EHS

1944——

Computation of tax follows:

| | | |
|---|---|---|
| Compensation from Coast Guard (W.I.C.) | | $5802.08 |
| Compensation form Bureau of Standards (B.C.) | | 2190.01 |
| Total income | | $7992.09 |
| Less: Standard Deduction | | 500.00 |
| Net income | | $7492.09 |
| Less: Surtax exemption | | 2000.00 |
| Balance subject to surtax | | $5492.09 |
| Surtax —— | | $1227.94 |
| Net income | $7492.09 | |
| Less: Normal tax exemption | 1000.00 | |
| Balance subject to normal tax | 6492.09 | |
| Normal tax | | 194.76 |
| Total Tax | | $1422.70 |
| Less: Tax withheld | | 1195.60 |
| Increase | | $433.59 |

Remittance for this amount plus interest at 6% per annum from 3-15-45 to date of payment should be forwarded for attention files symbols this letter.

Yours very truly,

N. B. EARLY, JR.
*Collector*

* * * * * * * * * *

11 Apr 24 1945

**Answer.**

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits that petitioners are husband and wife; that they are residents of Falls Church, Virginia, and that their income tax returns for the years 1943 and 1944, here involved, were filed with the Collector of Internal Revenue for the District of Virginia.

2. Admits that a statutory notice of deficiency was mailed to the petitioners on February 26, 1946, and that a copy thereof is attached to the petition.

3. Admits that the taxes in controversy are Federal income taxes for the years 1943 and 1944 in the amounts of $433.59 and $227.10 respectively.

4. Denies that the Commissioner's determination of the petitioners' liability for income tax for the years 1943 and 1944, as set forth in the statutory notice of deficiency, is erroneous, and further denies that the Commissioner erred as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

12 5(a) Admits that petitioner William I. Connelly was a temporary member of the United States Coast Guard Reserve during the years 1943 and 1944 and that he received no pay therefor other than the compensation of the civilian position which he held with the United States

Coast Guard on the date he was commissioned as a temporary member thereof. Denies each and every remaining allegation contained in subparagraph (a) of paragraph 5 of the petition.

5 (b) and (c). Denies each and every allegation contained in subparagraphs (b) and (c) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified as denied.

Wherefore, it is prayed that petitioners' appeal be denied.

J. P. Wenchel (PAB)
J. P. WENCHEL
*Chief Counsel*
*Bureau of Internal Revenue*

*Of Counsel*

PHILIP A. BAYER
*Division Counsel.*

G. J. LEBLANC
*Special Attorney*
*Bureau of Internal Revenue*

13 Filed at Hearing Oct 28, 1946

**Stipulation of Facts.**

It is hereby stipulated, by and between the parties hereto that the following statements may be accepted as facts, without prejudice to the right of either party to introduce additional evidence not inconsistent herewith.

1. The petitioners are husband and wife residing at 531 West Great Falls Street, Falls Church, Virginia. The returns for the periods here involved were filed with the Collector for the District of Virginia.

2. The notice of deficiency, a true and correct copy of which is annexed to the petition, was mailed to the petitioners on February 26, 1946.

3. The taxes in controversy are income taxes for the calendar years 1943 and 1944.

4. For many years prior to February 19, 1943, the petitioner, William I. Connelly, was a civil service employee of the United States. On March 1, 1942, he became an employee of the United States Coast Guard under the provisions of a reorganization executive order (E. O. 9083), in the capacity of senior attorney, grade P-5, and thereafter performed legal duties in the capacity of Chief, Admiralty and Maritime Section, Legal Division, Coast Guard Headquarters.

5. On February 19, 1943, he was enrolled under Section 307 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended by the Act of November 23, 1942, Public No. 773, 77th Congress, 2d Session (U. S. C. Title 14, Sec. 307), as a temporary member of the Coast Guard Reserve, and immediately ordered to full-time active special duty at Coast Guard Headquarters, Washington, D. C. The petitioner was enrolled in the rank of lieutenant commander, and thereafter during the period of his enrollment continued to receive for his services and the duties assigned to him compensation from Congressional appropriations allocated to pay for civilian positions. The duration of his enrollment was from February 19, 1943 to September 15, 1945. Deductions for civil service retirement were continued, and he was still governed by civil service regulations for annual and sick leave, and received overtime pay in excess of 40 hours per week. A true and correct copy of the said enrollment, acceptance, oath of office, and order to active duty (one document) is annexed hereto, made a part hereof and marked Exhibit 1-A.

6. On April 21, 1944, the petitioner's civil service position was reclassified from grade P-5 to grade P-6, effective March 16, 1944. On April 24, 1944, the petitioner was dis-

enrolled as lieutenant commander, effective as of March 15, 1944, re-enrolled in the rank of commander, Class T, Coast Guard Reserve, effective as of March 16, 1944, and again immediately ordered to full time active duty at Coast
15 Guard Headquarters. True and correct copies of a memorandum dated April 21, 1944 from the chief, Civilian Personnel Division to the Chief, Temporary Reserve Division, the disenrollment, report of change in personnel, the re-enrollment, acceptance, oath of office and order to active duty (four documents) are annexed hereto, made a part hereof and marked Exhibits 2-B, 3-C, 4-D and 5-E.

7. On September 15, 1945, the petitioner was disenrolled commander, Class T, Coast Guard Reserve. True and correct copies of the original disenrollment, a memorandum dated September 22, 1945 from the petitioner to the Commandant of the Coast, Guard, and a further disenrollment are annexed hereto, made a part hereof and marked Exhibits 6-F, 7-G, and 8-H.

8. There is only one Coast Guard ~~Reserve and~~ it is composed of regular and temporary members.

9. In their income tax returns for the years 1943 and 1944 the petitioners claimed as an exclusion from the income of the petitioner, William I. Connelly, for those years the annual allowance of $1,500 provided by law for military and naval personnel, which was disallowed by the respondent; and 1944 they claimed an additional exclusion of $2,171.10 as allowances for quarters and subsistence, which was also disallowed by the respondent.

10. In addition, in their return for 1943, the petitioners claimed that their medical expenses for that year exceeded 5% of their net income for the period by $134.65. The respondent disallowed $75 of that amount asserting that the amounts restored to income by the disallowances
16 aforesaid required that disallowance also. If the amounts were properly restored to income, then the disallowance of this item is also proper, but if the said

amounts were improperly restored to income, the disallowance of this item is also improper.

/s/ WILLIAM E. KOKEN
*Attorney for Petitioner*

/s/ J. P. WENCHEL
*Chief Counsel*
*Bureau of Internal Revenue*

17 **Exhibit 1-A.**

[Seal] Address the Commandant,
U. S. Coast Guard
and Refer to No.

UNITED STATES COAST GUARD
Washington
19 February, 1943.

From: Commandant,
To: William I. Connelly

Subject: Enrollment in Coast Guard Reserve as temporary member (Class T) and assignment to active duty.

References: (a) Section 207, Coast Guard Auxiliary and Reserve Act of 1941, as amended.
(b) Coast Guard Reserve Regulations, as amended.
(c) Personnel Bulletin No. 3-43, 11 January, 1943.
(d) Form No. 2748 for Acceptance and Oath of Office or Oath of Allegiance.

1. In accordance with references (a), (b) and (c), you are hereby enrolled as a temporary member of the Coast Guard Reserve for the duration of the war as Lieutenant Commander (rank or rating).

2. Subject to your acceptance and taking the prescribed oath of office, or oath of allegiance, as the case may be, you are, pursuant to references (a), (b) and (c), hereby ordered to full-time active special duty at Coast Guard Headquarters without pay other than the compensation of your civilian position.

3. While on active duty, you are vested with all the rights, privileges, powers and duties of a regular member of the Coast Guard Reserve of the same rank or rating, and you are subject to all laws and regulations for the government of the Coast Guard and its Reserve. You are not exempt from liability for training and service under the Selective Training and Service Act of 1940, as amended.

4. Your duties while on active duty will be as directed by the Commandant.

5. Such uniforms as may be required and prescribed will be furnished you.

A. G. Mossell,
By direction.

18 N. C. G. 2748
U. S. Coast Guard

*Acceptance*

Washington, D. C.
19 February 1943

To the Commandant of the Coast Guard:

Sir:

I hereby accept enrollment as Lieutenant Commander (temporary) in the Coast Guard Reserve, dated 19 February, 1943, to rank or rate as such from , 19 .

I hereby agree to perform active duty under this enrollment without pay or allowances, other than subsistence in kind or commutation thereof, and an allowance for uniforms. (This paragraph should be stricken out if the enrollee does not agree to serve without pay and allowances.)

Respectfully,

William I. Connelly
U. S. Coast Guard Reserve (temporary)

*Oath of Office* (for Officers)

To the Commandant of the Coast Guard:

Having been enrolled Lieutenant Commander (temporary), in the U. S. Coast Guard Reserve, I, William I. Connelly, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So Help Me God.

And I do further swear (or affirm) that I will use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports. So Help Me God.

WILLIAM I. CONNELLY
U. S. Coast Guard Reserve (temporary)

Subscribed and sworn to before me this day of 19 .

K. S. HARRISON

. . . . . .

20

**Exhibit 3-C.**

UNITED STATES COAST GUARD
Washington 25, D. C.

Address Reply to
The Commandant (PPP)
Refer to File: CG-781
24 April, 1944

To: Lieutenant Commander (T) William I. Connelly, USCGR

Subj: Disenrollment, Class T, USCGR; re-enrollment as Commander, Class T, USCGR

You are hereby disenrolled from your present status as a Lieutenant Commander, Class T, USCGR, in order that

you may be re-enrolled as a Commander, Class T, USCGR. This disenrollment is effective as of 15 March, 1944.

I. B. STEELE
By direction

* * * * * * * * *

22 **Exhibit 5-E.**

Temporary Member of Coast Guard Reserve
Enrollment and Active Duty Assignment
From Office of District Coast Guard Officer:

Naval District U. S. Coast Guard Headquarters City Washington, D. C. State Date 24 April, 1944

To: William I. Connelly Rank or Rating Commander

1. In accordance with the provisions of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, and Coast Guard Reserve Regulations as amended, and subject to your acceptance and execution of the prescribed oath of office or oath of allegiance, you are hereby enrolled as a temporary member of the United States Coast Guard Reserve, with the rank or rating indicated above, USCGR, Class T, from 16 March, 1944.

2. The period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority.

3. You will perform such duties as may be prescribed from time to time by Coast Guard authority in the classification checked below:

1. ( ) Auxiliary members enrolled in Class T.
2. ( ) Volunteer Port Security Force.
3. ( ) Enrolled for other volunteer duty, namely ———.
4. ( ) Pilots.
5. (x) Coast Guard Civil Service Employees.
6. ( ) Officers of Great Lakes Vessels.

You are authorized to wear the prescribed uniform only while on active duty and while enroute to and from such

duty. Members in Classifications 1, 2, and 3 will be on active duty only as directed by competent authority for a minimum of 12 hours per week. They will not be subject to transfer without their consent. Members in Classifications 4 and 5 will be on active duty and subject to call at all times. Members in Classification 6 will be on active duty only during the open season of navigation on the Great Lakes.

4. Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or enroute to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade or rating. You shall be subject to the laws, regulations and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended.

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Government employees) except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of: None.

6. You are not by reason of enrollment as a temporary member of the Reserve exempt from registration and liability for training and service under the Selective Training and Service Act.

7. You will be entitled to the following benefits and privileges only: (a) in the case of physical injury incline of duty while performing active Coast Guard service, or death as a result of such physical injury, the benefits prescribed by law for civil employees of the United States, as administered by the United States Employees' Compensation Commission, to the extent that the same may be applicable. (b) In the case of sickness or disease contracted while performing active duty, the same hospital (including medical but exclud-

ing dental) treatment as is afforded members of the regular Coast Guard. (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations.

8. You are hereby ordered, upon acceptance of this enrollment and execution of the prescribed oath, to commence active duty at: Legal Division at U. S. Coast Guard Headquarters, in accordance with the above terms and conditions, effective 24 April, 1944.

Accepted William I. Connelly Date 24 April, 1944

Enrolling Official (By Direction of the Commandant I. B. Steele, Commander, USCG.

Oath of Office (For Officers)

Having been enrolled as Commander (temporary) in the United States Coast Guard Reserve, I, William I. Connelly, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So Help Me God. And I do further swear (or affirm) that I will use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports. So Help Me God.

WILLIAM I. CONNELLY
*Comdr. (T), USCGR*

Subscribed and Sworn to before me this 24 day of April, 1944.

I. B. STEELE
*Commander, USCG*

Oath of Allegiance (For Enlisted Men)

Having been enrolled as (temporary)

in the United States Coast Guard Reserve, I,

, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the laws and regulations for the government of the United States Coast Guard.

*United States Coast Guard Reserve (Temporary)*

*(Signature and Title)*

Subscribed and sworn to before me this day of

, 19 .

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**Excerpts from Testimony and Proceedings.**

28 The Tax Court of the United States.

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Court Room No. 2,
Bureau of Internal Revenue,
Washington, D. C.
Monday, October 28, 1946—11:30 a.m.

(Met pursuant to notice.)

Before:

Hon. J. Russell Leech, Judge.

Appearances:

Wm. E. Koken, Esq., 1508 H St., N.W., Washington, D. C., appearing for the petitioner.

O. M. Wolff, Esq., (Hon. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), for the respondent.

. . . . . .

29 PROCEEDINGS.

34 **William I. Connelly**

Direct examination
By Mr. Koken:

35 Q. Will you give the Court a brief sketch of your service with the Government of the United States? A. I first entered the service of the United States in 1918 with the Construction division of the Army, transferring from there into the Shipping Board where I remained at Washington and in New Orleans from 1919 until 1940, thereafter entering the Office of the Solicitor of the Department of Commerce in Washington, where I remained until the first of March 1942.

On that date, by Executive Order 9083, the functions of the Bureau of Marine Inspection and Navigation were transferred from the Department of Commerce to the Coast Guard. As my duties in the Office of the Solicitor were directly involved with the functions of the Bureau and as the personnel of the Bureau were transferred to the Coast Guard, I was transferred to the Coast Guard.

My work with the Department of Commerce had been specialized and I was retained by the Coast Guard and in the Legal Division of the Coast Guard on that specialty until the 19th of February, 1943.

Q. What happened on that date? A. That afternoon at five o'clock I was sworn in—took the oath of office as an officer of the Coast Guard, with the rank of Lieutenant Commander as a temporary member of the Coast Guard Reserve.

36 Q. Would you explain the circumstances surrounding that appointment, briefly? A. An invitation had been offered me before for persons in so-called key positions to accept commissions with the Coast Guard. At that time I felt that my qualifications in the service might be of some

service to the Coast Guard, and I applied for a commission. Because of my age and the specialized characteristics of the work which I had been performing, I was informed that I was not eligible for general sea duty and they were already receiving too many specialists to justify the issuance of a straight Coast Guard Commission.

Thereafter in January of 1943 I received a letter addressed to me personally suggesting that I accept an appointment or an enrollment as a temporary member of the Coast Guard Reserve. I relegated that to the waste basket, because I was not interested, and later on I was informed that it might be to my best interest if I accepted and performed the duties thereof.

Those are the circumstances under which I entered the Coast Guard Reserve.

Q. Immediately after enrollment, what was your understanding as to the nature of your status because of the enrollment? A. Because of the representations that had been made, in writing or orally, I saw no reason for drawing a conclusion that there was any difference between my status as an officer in the Coast Guard Reserve and any other person who had graduated from the Coast Guard Academy or who had been brought into the Coast Guard Reserve during the war emergency. In other words, I thought that I was an officer of the Coast Guard Reserve without qualifications—without any restrictions or limitations.

Q. Did you have any idea that your duties after enrollment were to be any different than prior to it? A. No, sir.

Q. Did you have any understanding that your duties after enrollment were to be military? A. After that enrollment I definitely thought I was performing military functions and military duty.

Q. Were you required to obtain and wear a military uniform during the term of your enrollment? A. I was.

Q. Under what circumstances? A. My orders stated I should obtain the uniform that was defined by the regula-

tions, and I was told that I would receive the customary $250 military clothing allowance which was issued to officers in the Coast Guard and the Reserve. Thereafter I was informed that some part of the clothing which I would
38 wear would be issued out of the stockroom at Coast Guard Headquarters, but they discovered that the influx of other commissioned officers had depleted that stock and it was finally arranged for them to give me a purchase order on Livington's Clothing Store up on Seventh Street where I went and obtained two blue uniforms, two khaki uniforms and a white uniform and some of the appurtenances.

Later it was decided that the difference between that which had been expended and the $250 would be paid to me in cash, and I received, finally, the full value of the $250 clothing allowance.

Q. It is common knowledge, is it not, among military personnel that newly commissioned officers are entitled to a uniform allowance of $250? A. Yes.

Q. After you took the oath of office as a temporary reservist, how was your life as a civilian affected? A. Well, before I took the oath of office I was required to report for duty in the morning at eight o'clock and at 4:30 in the evening I was through, if I so chose. After I took the oath of office I learned that I was under the complete control and authority of the Coast Guard for 24 hours a day, that my orders so stipulated.

I would require a written permission from my commanding officer before I could leave the base and go to a distance of more than 50 miles, without being exposed
39 to the risk of arrest by the shore patrol or other authority.

If I happened to have two or more guests at my home I was required to don the regulation uniform and wear it at all times, and by that I mean that the regulation uniform as worn in my home had to conform in all respects to the regulations. Nothing of informality was attached to that wearing of the uniform.

I was required to exchange the customary courtesies of salute when the salute was tendered to me or when, under certain circumstances I should initiate it as being the junior officer.

If by any chance I was indisposed, could not report to duty, instead of calling up my secretary and having her put me on the sick list, I had to report through the duty officer of the Coast Guard, and that duty officer would make the necessary report not only to my commanding officer and the chief counsel, but also any other reports that were necessary to be made.

Q. In other words, there was a direct impact of considerable consequence on your civilian life? A. There was a direct impact in the sense that in any transgressions I might indulge I was subject to all the Navy regulations as respects discipline, and that could, under appropriate circumstances, amount to a general Court Martial.

Q. And were you addressed as "Commander," as
40 were other officers of your status? A. Yes.

* * * * * * * * * *

42 Q. Why, may I ask, do you retain the uniform?

A. There are two purposes. The first is that under Coast Guard authority on occasions of state or military importance I am entitled to wear the uniform; and the second reason, rather remote, I hope, is the authorization which has been given, or rather the directions have been given to the Coast Guard temporary members that they are entitled to be interred in the National Cemetery, and I expect to wear at least this coat on that occasion.

Q. Will you inform the Court of the significance of the ribbons that are attached to the uniform jacket? A. Those ribbons are campaign ribbons which have been authorized by the Secretary of the Navy, accepted y the Commandant of the Coast Guard under Executive Order permitting the issuance of ribbons at least temporarily for the medals that will be eventually worn by the recipients of these ribbons under certain prescribed conditions.

Q. Did you receive authorization to wear those ribbons? A. Yes, sir.

. . . . . .

43 Q. Commander, is it your understanding it was necessary for a person to have been a member of the Armed Forces of the war just ended to entitle that person to wear the ribbons? A. I so understand.

. . . . . .

45 Q. As a reserve officer were you authorized to use the postal franking privilege? A. Not only could but did so.

Q. Was that privilege accorded to civil employees in the service of the United States? A. No, sir.

Q. Were you also authorized to purchase from ship's stores in the Quartermaster Corps and Coast Guard? A. I was.

Q. Was that privilege accorded to the civil service employees in the United States? A. No, it was not.

Q. Did you become a member of what is called the Coast Guard Wine Mess? A. I did.

Q. Is that privilege available to civilian civil service employees of the United States? A. It was not.

Q. Were you permitted to use military and naval messes and cafeterias? A. Yes.

Q. Was that extended to civil service employees of the United States? A. Only on rare occasions when the civil servant was invited as a guest of an officer. It is my
46 understanding that the officers could take a civilian into the Coast Guard cafeteria or mess—it was twice a month, two times a month, but that same restriction applied to the officers' dependents as well.

Q. That is as a guest? A. As a guest.

Q. Did you or did you not receive a ration card issued by the Navy Department to its military personnel? A. I did.

Q. For the purpose of purchasing tobacco from the ship's store? A. I did.

Q. Were those cards issued to any civilian personnel that you know of? A. They are issued to civilian personnel if the civilian personnel were the wife or dependent of the military person, but they were distinguished. The military person received the military card and the dependent received a civilian card.

Q. Did you or did you not have access to or use the medical facilities in the Navy Department or the United States Public Health Service? A. I did.

Q. Was this privilege extended to civil employees
47 of the United States? A. No.

Q. Did you or did you not receive any dental attention while in the service? A. I did not receive any, although I was entitled to it.

Q. Was that privilege available to civil service employees? A. I understand not.

Q. Did you or did you not receive any optical service or medical attention while you were in the service? A. One time for each.

Q. Was that benefit available to the civil service employees of the United States? A. I understand not.

Q. Were you entitled to the use of the war ballot which was available only to the members of the Armed Forces while you were absent from your state of domicile? A. Yes, it was so held that I was.

Q. And what is your state of domicile? A. Louisiana.

Mr. Koken: I believe that is all.

* * * * * * * * * *

63 **Petitioner's Exhibit 6**

United States Coast Guard

Washington

Address Reply to
The Commandant (F)

24 July, 1943

Office Memorandum No. 13-43

Subj: Military status of temporary members of the Coast Guard Reserve; military authority, customs, and procedures applicable to temporary members of the Coast Guard Reserve in the execution of their duties under their temporary enrollment.

1. It has come to the attention of the Commandant that there exists considerable confusion as to the military status of temporary members of the Reserve, with particular reference to civil service employees who have been enrolled as temporary members of the Reserve, in regard to the military authority to be exercised by them, their use of military titles and procedure, and the applicability to temporary members of the Reserve of military regulations, customs and practices.

2. It is desired to impress upon all heads of offices, chiefs of divisions, and all regular and Reserve personnel that while engaged on active duty, as set forth and described in his certificate of temporary enrollment, a temporary member of the Reserve has the same power, authority, rights and privilges as members of the regular Coast Guard of similar rank, grade, or rating in the execution of the duty assigned to him. Accordingly, a temporary member of the Reserve, regardless of whether or not under the law he retains his civil service status or is temporarily enrolled under other conditions, exercises, during the periods of active duty set forth in his certificate of temporary enrollment, the same military authority and assumes the same military responsibility in the execution of his assigned tasks as a member of the regular Coast Guard or of the regular Reserve of the same rank, grade, or rating. A temporary member of the Reserve is, therefore, entitled to the same military courtesy and privileges, and is governed by the same military procedures and practices as regular personnel and to the same extent.

3. The Commandant desires to make it crystal clear that there is a definite distinction between the military status and activities of a temporary member of the Reserve and the determination of the benefits—particularly with regard to pecuniary benefits—that derive to such temporary members in the Coast Guard Reserve. This question of benefits, particularly financial benefits, of temporary members of the Reserve is not involved in this memorandum whatsoever, and nothing in this memorandum shall be so construed.

64 4. It is directed that hereafter temporary members of the Reserve will, in the execution of their official duties at Coast Guard Headquarters, occupy the same place in the scheme of Headquarters organization as members of the regular Coast Guard and the regular Reserve. They shall exercise military authority and accept military responsibility within the scope of their active duty functions, in accordance with the terms of their temporary enrollment, with regard to conditions of service, authority, powers, duties, periods of active duty, etc.

5. Temporary members of the Reserve will be expected to observe military customs, practices, and etiquette, and in turn will be accorded military courtesies in accordance with their rank, grade, or rating. Temporary members of the Reserve will be included in all training programs, lectures, etc. in the same manner and on the same basis as other members of the Coast Guard Reserve assigned to Coast Guard Headquarters. Their military title shall be used when applicable and in the same manner as military titles of regular military personnel. In short, temporary members of the Reserve, in the exercise of the duty for which enrolled and during the period of the exercise of such duty as set forth in the certificate of temporary enrollment, are on exactly the same basis as other members of the Reserve with regard to the exercise of military authority and the acceptance of military responsibility; and all military procedures, practices, customs, and etiquette shall be ap-

plicable to such temporary members except where specifically exempted by orders of the Commandant.

6. The attention of heads of offices and chiefs of divisions is invited to the fact that one of the principal reasons for the induction of civil service employees into the military establishment as temporary members of the Reserve was to obtain a homogeneous organization on a military basis and to eliminate differences in procedure and practices applicable to military personnel and civil service personnel engaged on exactly the same duty; and this memorandum is issued in order to effectuate that policy.

7. It is desired to reiterate that nothing contained in this memorandum has any bearing on the benefits accruing to a temporary member of the Reserve by reason of the military status acquired by temporary membership in the Coast Guard Reserve as set forth herein.

R. R. WAESCHE,
Commandant.

CG Distribution:
Headquarters only

* * * * * * * * * *

## Findings of Fact and Opinion.

79 Docket No. 10372. Promulgated April 21, 1947.

In the taxable years 1943 and 1944, petitioner, William I. Connelly, a government employee holding a classified civil service position, was enrolled as a temporary member of the Coast Guard Reserve with a rank or rating of Lieutenant Commander and later, Commander. The certificate under which he was enrolled stated he was to serve without pay and allowances other than the compensation of his civilian position. Held: (a) Petitioner was not a commissioned officer of the Coast Guard Reserve entitling him to a tax exclusion of $1,500 in the respective taxable years, within the purview of section 23 (b)(13), I. R. C., as amended by the Revenue Act of 1945; and (b) Petitioner

is not entitled to deduct the sum of $2,171.10 in the taxable year 1944 as allowance for subsistence and quarters.

Medical expenses in excess of five per cent of net income claimed are properly adjusted on restoration to gross income of the disallowed exclusions.

80 William E. Koken, Esq., for the petitioners.

E. M. Woolf, Esq., for the respondent.

This proceeding involves income tax deficiencies for the taxable years 1943 and 1944 in the respective amounts of $433.59 and $227.10. The issues are: (1) Whether petitioner, William I. Connelly, is entitled to exclude from income received from the United States Coast Guard the amount of $1,500 for each of the taxable years 1943 and 1944 under the provisions of section 22 (b)(13) of the Internal Revenue Code; and (2) whether said petitioner is entitled to deduct from income received from the United States Coast Guard for the taxable year 1944 the amount of $2,171.10, which represents the allowance for quarters and subsistence of a regular commissioned officer in the United States Coast Guard Reserve.

The case was submitted on a partial stipulation of facts, oral stipulations, oral testimony and exhibits. We incorporate as findings, all the stipulated facts. Facts found which were not stipulated are found from the evidence.

## FINDINGS OF FACT.

The petitioners are husband and wife and reside at 531 West Great Falls Street, Falls Church, Virginia. Their returns for the taxable years involved were filed with the collector of internal revenue for the district of Virginia. For many years prior to February 19, 1943, petitioner, William I. Connelly (hereinafter referred to as "petitioner"), was a civil service employee of the United States. On March 1, 1942, petitioner became an employee of the United States Coast Guard under the provisions of a

81 reorganization executive order (E.O. 9083) in the capacity of senior attorney, grade P-5, and there-

after performed legal duties in the capacity of chief, admiralty and maritime section, legal division, Coast Guard Headquarters. On February 19, 1943, under section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended by the Act of November 23, 1942 (U.S.C. Title 14, sec. 307), petitioner was enrolled as a temporary member of the Coast Guard Reserve for the duration of the war with the rank of Lieutenant Commander. He was ordered to full time active special duty at Coast Guard Headquarters without pay other than the compensation of his civilian position. While on active duty, petitioner was vested with all the rights, privileges, powers and duties of a regular member of the Coast Guard Reserve of the same rank, and was subject to all laws and regulations for the government of the Coast Guard and its Reserve. Petitioner was not exempt from liability for training and service under the Selective Training and Service Act of 1940, as amended. During the period of his enrollment petitioner continued to receive for his services and the duties assigned to him compensation from Congressional appropriations allocated to pay for civilian positions. Deductions for civil service retirement were continued and petitioner was still governed by civil service regulations for annual and sick leave and received overtime pay in excess of 40 hours per week. The memorandum of enrollment, dated February 19, 1943, was from the Commandant of the Coast Guard to petitioner and was signed by "A. G. Morrill, By direction".

82 On April 21, 1944, petitioner's civil service position was reclassified from grade 5 to grade 6, effective March 16, 1944. It was recommended by Chief Counsel, United States Coast Guard, to Chief, Temporary Reserve Division, that petitioner be promoted to the rank of Commander (Class T), to rank as such from March 16, 1944, which action would be in accordance with the two conditions set forth in the Commandant's Memorandum of March 10, 1944, pertaining to the promotion of members of the temporary Reserve Headquarters, who are also civilian

employees. On April 24, 1944, petitioner was disenrolled as Lieutenant Commander (Class T), effective as of March 15, 1944, and re-enrolled in the rank of Commander (Class T), Coast Guard Reserve, effective as of March 16, 1944.

The certificate headed "Temporary Member of Coast Guard Reserve Enrollment and Active Duty Assigned", *inter alia*, stated:

2. The period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority.

3. You will perform such duties as may be prescribed from time to time by Coast Guard authority in the classification checked below:

* * * * * * * * *

5. (x) Coast Guard Civil Service Employees.

* * * * * * * * *

You are authorized to wear the prescribed uniform only while on active duty and while enroute to and from such duty. * * * Members in Classifications 4 and 5 will be on active duty and subject to call at all times. * * *

4. Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you
83 are actually engaged on active duty or enroute to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade or rating. You shall be subject to the laws, regulations and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended.

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Gov-

ernment employees), except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of:

Note.

6. You are not by reason of enrollment as a temporary member of the Reserve exempt from registration and liability for training and service under the Selective Training and Service Act.

7. You will be entitled to the following benefits and privileges only: (a) In the case of physical injury in line of duty while performing active Coast Guard service, or death as a result of such physical injury, the benefits prescribed by law for civil employees of the United States, as administered by the United States Employees' Compensation Commission, to the extent that the same may be applicable. (b) In the case of sickness or disease contracted while performing active duty, the same hospital (including medical but excluding dental) treatment as is afforded members of the regular Coast Guard. (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations.

8. You are hereby ordered, upon acceptance of this enrollment and execution of the prescribed oath, to commence active duty at Legal Division at U. S. Coast Guard Headquarters in accordance with the above terms and conditions, effective 24 April, 1944.

On September 15, 1945, petitioner was disenrolled as a temporary member of the Coast Guard Reserve. The original disenrollment form issued by Coast Guard Headquarters to petitioner stated the reason for disenrollment was "For his own convenience" and that the type of service was "Coast Guard Civil Service Employee, without military pay". Petitioner filed a written protest specifically objecting to the description of "Record of Service". Later another disenrollment was issued to petitioner stating the reason for disenrollment was "com-

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pletion of service because of satisfactory completion of assigned duties". The type of duty performed was "Chief of Admiralty and Maritime Section having civil service status, receiving civilian but no military pay, and holding rank of Commander as a Temporary Member of the Coast Guard Reserve". There is only one Coast Guard Reserve and it is composed of regular and temporary members. Petitioner received total civilian pay from the Coast Guard for the year 1943 in the amount of $5,872.04 and for the year 1944, the amount of $5,802.08.

In their income tax returns for the years 1943 and 1944, the petitioners claimed as an exclusion from the income of petitioner William I. Connelly, the annual allowance of $1,500 provided by law for military and navy personnel, which was disallowed by the respondent; and for the year 1944, they claimed an additional exclusion of $2,171.10 as allowance for quarters and subsistence, which the respondent also disallowed.

In their 1943 return petitioners claimed that their medical expenses for that year exceeded five per cent of the net income for the period by $134.65. The respondent disallowed $75 of that amount, asserting that the amounts restored to income by the disallowances aforesaid required that disallowance also. It was stipulated that if the amounts were properly restored to income then the disallowance of $75 is proper; but if said amounts were improperly restored to income the disallowances of this item is improper.

85

## OPINION.

LEECH, Judge: The primary issue is whether the respondent correctly determined that petitioner is not entitled to the exclusion of $1,500 in each of the taxable years under the provisions of section 22 (b)(13)(A) of the Internal Revenue Code, as amended by section 141 (a) of the Revenue Act of 1945. By section (b) of that act subsection (A) is made applicable to taxable years beginning after Decem-

ber 31, 1942, and (B) is made applicable to the years beginning after December 31, 1940.[1]

The argument of the petitioner is almost entirely devoted to attempting to prove that he was "in the military or naval forces of the United States during the war". We think the issue is much narrower. Unless the petitioner is a commissioned officer (or commissioned warrant officer)" in such forces, he is clearly not entitled to the benefits of such section. Congress has limited the $1,500 exclusion to persons rendering active service in the military and naval forces who meet the well defined specified classes. Statutes granting tax exemptions must be strictly construed in favor of the government. Bank of Commerce v. State of Tennessee, 161 U.S. 134. Petitioner's own testimony rather conclusively establishes that he was not a commissioned officer in the Coast Guard Reserve. On cross-examination he testified as follows:

"Q. I believe you stated that you applied for a commission in the United States Coast Guard Reserve.

A. That is right.

"Q. Prior to being enrolled?

"A. That is right.

"Q. And you were not commissioned in the United States Coast Guard Reserve?

"A. I never received a commission from the Coast Guard as a commission is commonly classified. I did receive this

[1] SEC. 141. ADDITIONAL ALLOWANCE FOR MILITARY AND NAVAL PERSONNEL.

(a) In General.—Section 22 (b)(13) (relating to the exclusion from gross income for military and naval personnel) is amended to read as follows:

"(13) Additional Allowance for Military and Naval Personnel.—

"(A) In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war, or, in the case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, so much of such compensation as does not exceed $1,500.

"(B) Compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a member below the grade of commissioned officer (or commissioned warrant officer) in the military or naval forces of the United States during such war".

so called certificate of enrollment which I was led to believe was the substitute for the commission".

Petitioner was enrolled as a temporary member of the Coast Guard Reserve without military pay. Provision for such enrollment was authorized by Act of Congress. See Chap. 9, Title 14, Section 307, United States Code Annotated.[2] The House Report recommending the Bill 87 (56 Stat. 1020) clearly shows that its purpose was to permit enrollment of Government employees without military pay, and to give them temporary rank or ratings and necessary military authority and responsibility.[3]

[2] The Commandant * * * is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe * * * such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, * * * to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades and ratings as are provided for the personnel of the regular Coast Guard Reserve.

[3] H. R. No. 2525, 77th Cong., 2nd Sess., (1942), in part, states:

The act of June 6, 1942 (Public Law 599, 77th Cong.), amended section 207 of the Coast Guard Auxiliary and Reserve Act of 1941 so as to authorize the enrollment of especially qualified men as temporary members of the Coast Guard Reserve for full time, intermittent, or part time duty without pay. Under this authority men in all walks of life have been enrolled in the Coast Guard Reserve and perform special duty with military authority and responsibility in addition to carrying on their regular vocations. * * *

* * * * *

Under the authority now contained in the Coast Guard Auxiliary and Reserve Act as outlined above, it is believed that Government employees may be enrolled as temporary members of the Coast Guard Reserve without pay on the same basis as persons of other civilian status, but your committee deems it advisable to clarify this authority and resolve any doubt of its applicability to Government employees by specifically providing for temporary membership in the Coast Guard Reserve of Government employees without military pay but with continuance in their civilian positions and the receipt of the compensation thereof. It should be pointed out that the conferring of temporary ranks or ratings upon such persons will not exempt them from liability for training and service under the Selective Training and Service Act of 1940, as amended. It will, however, give to such employees necessary military authority and responsibility during their temporary membership in the Coast Guard Reserve.

* * * * * *

This amendment is proposed and recommended by your committee since it would solve this administrative problem by resolving any possible doubt of the authority of the Coast Guard to enroll certain Government employees as temporary members of the Reserve for active Coast Guard duty without the pay of their military rank or rating, and would obviate any possible impairment of the right of such employees to continue to receive the compensation of their civilian positions for the entire period of their performance of active Coast Guard duty as such temporary members. There will be little, if any, change in the nature of their duties after enrollment.

88 Civil service employees enrolled as temporary members of the Coast Guard Reserve were still governed by civil service regulations for annual and sick leave; deductions from pay under the Civil Service Retirement Act were continued and they received overtime pay in excess of 40 hours per week. The fact that petitioner was permitted to enjoy certain privileges accorded to personnel having a military status is of no controlling significance. Unless he was a commissioned officer, we think he was not entitled to the tax exemption benefit provided for in section 22 (b)(13)(A) and (B) of the Code, as amended. Commissioned officers of the Coast Guard are appointed by the President.[4] The evidence is clear that petitioner received no such appointment. Congress, having provided for the temporary enrollment of Government employees in the Coast Guard Reserve who were to be given a rank or rating comparable to their civil service classification, was well aware such provision was in effect when it enacted the above quoted tax exemption section. That it limited the benefits of the $1,500 exclusion specifically to a "commissioned officer (or commissioned warrant officer)" clearly indicates to us that Government employees, holding a temporary rank of commissioned officer, were not to receive the benefit of such tax exclusion.

89 The petitioner argues that if he is not entitled to the $1,500 exclusion as a commissioned officer, his entire civil service compensation of approximately $5,800 is excludable under subdivision (B) "as a member below the grade of commissioned officer". The absurdity of this contention is at once apparent. This subdivision makes no mention of any specific amount which those persons below the rank of commissioned officer are entitled to exclude. No amount was specified because it is a matter of common knowledge that the compensation of members of the military and naval forces of the United States below the rank of the commissioned officers mentioned in the stat-

[4] Section 6, Title 14, United States Code Annotated.

ute is less than $1,500 annually. We think the language of subdivision (B) lends support to our conclusion that Congress advisedly used the terms "commissioned officer (or commissioned warrant officer)" in the sense those terms are used throughout the statutes pertaining to our military and naval forces. We, therefore, conclude that the respondent properly disallowed the claimed exclusion of $1,500 in the respective taxable years 1943 and 1944.

Petitioner's claimed deduction in the taxable year 1944 of the amount of $2,171.10, which would represent the total amount he would have received for subsistence and rental if he had been compensated under the Pay Readjustment Act, also appears to us to be without merit. Petitioner, in fact, received nothing for subsistence or allowance for quarters. The certificate of enrollment of April 24, 1944, which petitioner received, provides, in part, as follows:

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Government employees), except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of:

None.

A commissioned officer in the Coast Guard Reserve is entitled, in addition to his base pay, to certain allowances for subsistence and quarters.[5] Since petitioner was not a "commissioned" officer and in fact received no allowance for subsistence and quarters, he is not entitled to deduct an amount equivalent to such allowances for tax purposes. The respondent's denial of such contested allowances is sustained.

Under the stipulation, the deduction of the amount of $75 claimed as medical expenses was properly disallowed.

Reviewed by the Court.

Decision will be entered for the respondent.

[5] See sections 5 and 6, Pay Readjustment Act, June 6, 1942 (56 Stat. 359), as amended.

91 **Decision**

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated April 21, 1947, it is

Ordered and decided: That there are deficiencies in income tax of $433.59 and $227.10 for the years 1943 and 1944.

(Signed) J. Russell Leech.

Enter:

.....

Judge.

Entered Apr. 22, 1947.

* * * * * * * * * * *

Denied May 22, 1947

(Signed) J. Russell Leech Judge

Filed-May 20, 1947

* * * * * * * * * * *

92 **Motion for Rehearing**

Come now the petitioners in the above-captioned action and move this Honorable Court for a rehearing of the questions presented in this action, and as grounds therefor respectfully submit that they now desire to stress the following newly-made law and offer newly-discovered evidence, which was not available to the petitioners or to this Court at the time of the original hearing, and which could not have been made available at such time by the exercise of due diligence on the part of the petitioners. Said evidence, if is respectfully submitted, has a direct bearing upon the questions of law decided herein, and justifies, it is believed, this Court in rendering a decision favorable to the petitioners instead of one favorable to the respondent, such as was actually rendered under date of April 21, 1947.

New Law

On March 24, 1947, the United States Court of Appeals for the District of Columbia rendered its decision in
93 two cases as yet not appearing in the bound reports,

Mitchell, et al. v. Cohen, Docket No. 9446, and Mitchell, et al. v. Hubickey, Docket No. 9447. The Court there had before it the question of the status of two former members, temporary, of the United States Coast Guard Reserve, under the Veterans Preference Act of 1944, 58 Stat. 387, 5 U.S.C.A., Sec. 851, Act of June 27, 1944. It was held that Cohen and Hubickey were entitled to their rights as "ex-servicemen" under the said Act after an exhaustive review by the Court of their status in the Coast Guard Reserve, the functions they performed therein and the consequences flowing therefrom. While a slip copy of this decision was sent to the Clerk of this Court about three weeks before the decision was rendered herein, petitioners did not have full opportunity to argue the highly persuasive, if not controlling, character of the opinion of the D. C. Court of Appeals.

The full opinion is attached hereto, marked Exhibit 1, and prayed to be read as a part of this motion.

## New Evidence

The petitioners in their brief cited on pages 11 and 12 excerpts from certain court-martial orders and pronouncements by the Judge Advocate General of the Navy as to the status so far as his Department was concerned of members, temporary, of the Coast Guard Reserve. Since the time of the preparation of their brief, the petitioners have had access to the record of the general court-martial of Richard S. Belli, a member, temporary, of the Coast Guard Reserve and of the opinion on review by Read Admiral T. L. Gatch, Judge Advocate General of the Navy, as well as the opinion on review of the Honorable James V.
94 Forrestal, then the Acting Secretary of the Navy.

The said two opinions are attached hereto, marked respectively Exhibits 2 and 3, and prayed to be read as a part hereof.

As a result of the occurrence out of which grew the court-martial of the above Richard S. Belli, three other members,

temporary, of the Coast Guard Reserve were tried and convicted by a general court-martial. Upon review, their respective sentences were mitigated, but in none of the cases was the plea to the court's jurisdiction over the accused successful. In other words, the pronouncements in the general court-martial orders in the petitioners' brief were actually carried out in general courts-martial, and show conclusively that the members of the Temporary Coast Guard Reserve were subject to Naval discipline and considered to be in the Armed Service.

## Matter for Reconsideration

In addition to the foregoing, a further reason exists for a rehearing and reconsideration of this case. In its decision, among other things, the court apparently places much reliance upon Section 6, Title 14, United States Code Annotated. The Court correctly points out that under that section "Commissioned officers of the Coast Guard are appointed by the President." It is admitted that petitioner, William I. Connelly, received no such appointment.

The Court's attention, however, is respectfully invited to the fact that the abovementioned Section 6 is concerned solely with the commissioning of regular Coast Guard officers. The said petitioner never has claimed to have
95 been a regular Coast Guard officer or to have enjoyed any rights whatsoever under Section 6, which was enacted in 1915.

Instead the said petitioner claims his rights under the Act of Congress approved February 19, 1941, Sections 301, *et seq.* as amended by the Act of November 23, 1942 (part of Subchapter II of Chapter 9 which created the Coast Guard Reserve). Section 301 says, in part:

"There is hereby created and established a United States Coast Guard Reserve (hereinafter referred to as the 'Reserve') the purpose of which is to provide a trained force of *officers* and enlisted personnel * * *"

Under Section 307,

"The Commandant * * * is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, * * * such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, * * *, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective, ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve."

The petitioner, William I. Conaelly, was "enrolled" in the temporary reserve of the Coast Guard under Section 307 by the Commandant with the rank of Lieutenant Commander. A Lieutenant Commander in the Coast Guard is a Commissioned Officer by definition.

Under the Constitution of the United States, Congress is charged with the duty of providing and maintaining a Navy, Article I Sec. 8, and by the passage of various
96 laws can provide any method of appointment, or enrollment, of commissioning of officers it may see fit. The Act of February 19, 1941, amended November 23, 1942, provided that the Commandant of the Coast Guard should have a power which was ordinarily vested in the President, or delegated to a Cabinet Officer. The Commandant was authorized to enroll officers, not over the rank of Captain, (See Sec. 303) in the Coast Guard Reserve on a temporary basis if they conformed to certain strict specifications. The petitioner, William I. Connelly, so conforming, was "enrolled" as a Lieutenant Commander.

The petitioner was on full time active duty during the period in question. He performed no civil service work

whatsoever. What he was being paid for was his work, which then consisted of tasks properly assignable in time of war to a Lieutenant Commander. It is submitted that by the simplest reasoning, defining the words as used in daily conversation, the petitioner was being paid for "active duty" as a "commissioned officer." The fact that his superior officers saw fit to assign him to tasks with which he was thoroughly familiar by reason of his work in the past as a civilian cannot negative the military nature of that work in time of war or the fact that he was a commissioned officer.

It is therefore respectfully submitted that the Court hold a rehearing for the purpose of giving effect to the above new law and new evidence and that its decision be reconsidered in the light of the foregoing.

CAESAR L. AIELLO
*Attorney for Petitioner*

* * * * * * * * * *

109 Filed Jul 16 1947

**Stipulation as to Venue**

The Petitioners and Respondent, by their respective attorneys, hereby stipulate, in accordance with the provisions of Section 1141(b)(2) of the Internal Revenue Code, that the decision of the Tax Court of the United States in the above entitled cause may be reviewed by the United States Court of Appeals for the District of Columbia.

CAESAR L. AIELLO

A. MURRAY PRESTON
Counsel for Petitioners,
901 Hibbs Building,
Washington 5, D. C.

SEWALL KEY
*Acting Assistant Attorney General*

* * * * * * * * * *

110 Filed Jul 16 1947

**Petition for Review by the United States Court of Appeals for the District of Columbia, of the Decision by the Tax Court of the United States**

William I. Connelly and Bertha Connelly, his wife, Petitioners herein, by Caesar L. Aiello and A. Murray Preston, their counsel, hereby petition for a review by the United States Court of Appeals for the District of Columbia, of the decision of the Tax Court of the United States, rendered April 21, 1947, in connection with which a motion for rehearing and reconsideration was denied on May 22, 1947, wherein the Tax Court of the United States determined that deficiencies in income taxes for the taxable years 1943 and 1944 in the respective amounts of $433.59 and $227.10 were proper and lawful. Said deficiencies grew out of the disallowance by Commissioner of Internal Revenue, among other things, of the following items:

1. A tax exclusion of $1,500 in the respective taxable years, as provided by Section 23(b)13, I.R.C., as amended by the Revenue Act of 1945, being an additional allowance for military and naval personnel during the recent World War II.

2. An amount of $2,171.10, which was deducted by Petitioners for the taxable year 1944, and represents the allowance for quarters and subsistence of a commissioned officer in the United States Coast Guard Reserve.

111 The Petitioners and Respondent, through their respective attorneys, have entered into a stipulation, pursuant to Sec. 1141 (b)(2) of the Internal Revenue Code, designating the United States Court of Appeals for the District of Columbia for the review of the decision which is the subject of this petition.

I

William I. Connelly and Bertha Connelly are husband and wife, citizens of the United States, and residents of Falls Church, Virginia. Their returns for the taxable years

involved herein were filed with the Collector of Internal Revenue for the District of Virginia. Mrs. Connelly's income tax liability is not involved herein, and this controversy stems from the status of William I. Connelly as a temporary member of the United States Coast Guard Reserve during World War II.

II

William I. Connelly, hereinafter referred to as "Petitioner," enrolled as a temporary member of the U. S. Coast Guard Reserve for the duration of the war, on February 19, 1943, with the rank of Lieutenant Commander, under the provisions of the Coast Guard Auxiliary and Reserve Act of 1941, as amended by the Act of November 23, 1942 (U.S.C.A. Title 14, Sec. 307), reading as follows:

"The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe,
112 including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowance of their

respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve."

III

Said Petitioner, immediately upon enrollment, was ordered to full time active duty at Coast Guard Headquarters. While on active duty he was vested with all of the rights, privileges, powers and duties of a regular member of the Coast Guard of the same rank, and was subject to all laws and regulations for the government of the Coast Guard and its Reserve.

IV

During his enrollment, Petitioner was required to obtain and wear the identical regulation uniforms provided for the regular (commissioned) officers of the Coast Guard, for which he was granted the customary uniform allowance of $250 given to all newly commisioned officers of the Navy and Coast Guard. He was required to conform to naval and Coast Guard regulations respecting the wearing of the uniform, and all of the regulations promulgated
113 for the governance of members of the Navy, Coast Guard and Coast Guard Reserve.

Moreover, Petitioner, because of his status and rank, was entitled to the use of the postal franking privilege; to make purchases from ship service stores; membership in the Coast Guard wine mess; use of military and naval cafeterias; the military tobacco ration card; use of the naval and Public Health Service facilities and hospitalization; use of the war ballot while absent from his state of domicile; and he was expressly authorized to wear the American Campaign Medal and the World War II Victory Medal. He exercised military authority over commissioned officers of the Coast Guard Reserve junior in rank to him who were assigned to duty in his office; and was in turn required to respond to the military commands of his superior officers. He was entitled to the usual military courtesies, and was

required to observe military etiquette at all times. None of the foregoing was required of or available to civilian or civil service employees of the United States; they are incident to active service in the armed forces of the United States in World War II; and, as the final reward, Petitioner, as a veteran, is entitled to interment in a National Cemetery. He was subject to court martial, just like any other member of the Navy, Coast Guard and Coast Guard Reserve, and by decision of this Court is entitled to civil service preference as a veteran under the so-called G.I. Bill of Rights (Mitchell v. Cohen, No. 9447, decided Jan. 24, 1947).

114

V

Prior to his enrollment, Petitioner was an employee of the United States Coast Guard, in the capacity of senior attorney, grade P-5, and performed legal duties in the capacity of Chief, Admiralty and Maritime Section, Legal Division, Coast Guard Headquarters. During and after his enrollment he received for the services and duties assigned to him the compensation of his civilian position.

VI

Effective March 16, 1944, the civil service position which Petitioner held was reclassified from grade P-5 to grade P-6, and effective of that same date, he was advanced to the rank of Commander, Class T, Coast Guard Reserve, which rank he held until September 15, 1945, when he was honorably disenrolled as a member of the Coast Guard Reserve.

VII

In their returns for the years 1943 and 1944, Petitioners claimed as an exclusion from the income of Petitioner, William I. Connelly, for those years, the annual allowance of $1,500 provided by law for military and naval personnel, and also deducted from income received from the United States Coast Guard for the taxable year 1944, the sum of $2,171.10,

which represents the allowance for quarters and subsistence of a commissioned officer in the United States Coast Guard Reserve for that year. Both items were disallowed by the Respondents, upon the ground that the Petitioner, William I. Connelly, was in a civilian status and performed
115 civilian duties during the period of his enrollment, and further because his compensation was derived from a civilian Government appropriation making the entire amount of his compensation subject to Federal income tax, holding in effect that where an individual receives pay from civilian sources or from a civilian government payroll, such compensation is regarded as not being remuneration for services as a member of the military or naval forces within the intendment of Section 23(b)(13) of the Internal Revenue Code.

VIII

The Tax Court of the United States affirmed the Respondent's action, by holding that Petitioner was not a commissioned officer of the Coast Guard Reserve, and, accordingly, was entitled neither to the tax exclusion of $1,500 in the respective taxable years, nor an allowance for quarters and subsistence.

Petitioners, being aggrieved by the Findings of Fact and Conclusions of Law of said Tax Court of the United States, desire to obtain a review thereof by the United States Court of Appeals for the District of Columbia.

WILLIAM I. CONNELLY
and
BERTHA CONNELLY
By CAESAR L. AIELLO
A. MURRAY PRESTON,
*Counsel for Petitioners*,
901 Hibbs Building,
Washington 5, D. C.

116 DISTRICT OF COLUMBIA, ss:

William I. Connelly and Bertha Connelly, being first duly sworn, on oath depose and say that they are the Petitioners named in the foregoing petition; that they have read the same and are familiar with the contents thereof; that the statements therein contained are true, to the best of their knowledge, information and belief.

WILLIAM I. CONNELLY
BERTHA CONNELLY

SUBSCRIBED and sworn to before me this 16th day of July, 1947.

ELIZABETH MAYNARD
*Notary Public, D. C.*

117 Filed Jul 16 1947

**Statement of Points in Review**

To: E. M. Woolf, Esq.,
*Counsel for Respondent.*

The parties seeking review of the decision of the Tax Court of the United States in the above entitled cause rely on the following points on review:

1. A temporary member of the United States Coast Guard Reserve, holding the rank of Lieutenant Commander and (later) Commander, assigned to full time, active, special duty in the Coast Guard was a "member of the * * * naval forces of the United States" during World War II.

2. A temporary member of the United States Coast Guard Reserve, holding the rank of Lieutenant Commander and (later) Commander, assigned to full time, active, special duty in the Coast Guard was a person on "active service" in the naval forces of the United States during World War II.

3. A temporary member of the United States Coast Guard Reserve, holding the rank of Lieutenant Com-

118 mander and (later) Commander, assigned to full time, active, special duty in the Coast Guard is entitled to the exclusion of $1,500 provided by Sec. 22(b)(13) of the Internal Revenue Code, and allowance for quarters and subsistence.

4. The compensation received by a temporary member of the United States Coast Guard Reserve, holding the rank of Lieutenant Commander and (later) Commander, assigned to full time, active, special duty in the Coast Guard was remuneration for service as a member of the military or naval forces, within the meaning of Sec. 22(b)(13) of the Internal Revenue Code, notwithstanding that such compensation came from a civilian government appropriation.

5. A temporary member of the United States Coast Guard Reserve holding the rank of Lieutenant Commander and (later) Commander, assigned to full time active special duty in the Coast Guard, is a "commissioned officer" within the meaning and intent of 14 United States Code Sec. 307, and therefore is entitled to the exclusions permissible under Sec. 22(b)(13) of the Internal Revenue Code, and allowance for quarters and subsistence.

CAESAR L. AIELLO

A. MURRAY PRESTON
*Counsel for Petitioners,*
901 Hibbs Building,
Washington 5, D. C.

120 Filed Jul 16 1947

## Designation of Record

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the District of Columbia, with reference to the petition for review heretofore filed by the petitioners in the above

cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) Petition, with exhibits
(2) Answer
(3) Stipulation of Facts, with exhibits
(4) Transcript of Testimony, with exhibits
(5) Decision of the Tax Court, promulgated April 21, 1947
(6) Motion for Rehearing and Reconsideration, denied May 22, 1947, with exhibits
(7) Statement of Points
121 (8) Stipulation of Counsel as to Jurisdiction
(9) This Designation of Record

CAESAR L. AIELLO

A. MURRAY PRESTON
*Counsel for Petitioners,*
901 Hibbs Building,
Washington 5, D. C.

Dated this 16th day of July, 1947.

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United States Court of Appeals for the District of Columbia Circuit

No. 9620

WILLIAM I. CONNELLY and BERTHA CONNELLY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of Decision of the
Tax Court of the United States

Argued December 7, 1948 Decided January 24, 1949

*Mr. A. Murray Preston* and *Mr. Caesar L. Aiello*, with whom *Mr. John Spalding Flannery* was on the brief, for petitioners.

*Mr. Meyer Rothwacks, pro hac vice*, by special leave of Court, with whom *Mr. Lee A. Jackson*, Special Assistant to the Attorney General, was on the brief, for respondent. *Mr. Carlton Fox*, Special Assistant to the Attorney General, *Mr. Ellis N. Slack*, Attorney, Department of Justice, *Mr. Charles Oliphant*, Chief Counsel, Bureau of Internal Revenue, and *Mr. Bernard D. Daniels*, Special Attorney, Bureau of Internal Revenue, also entered appearances for respondent.

Before EDGERTON, CLARK and PRETTYMAN, JJ.

PRETTYMAN, J.: This case is here upon a petition to review a decision of the Tax Court of the United States.

Petitioners are husband and wife. They filed joint income tax returns for 1943 and 1944 and claimed in each year as an exclusion from gross income $1,500 under authority of Section 22(b)(13)(A) of the Internal Revenue Code. On the return for 1944, they also excluded $2,171.10 under authority of Section 29.22(a)-3 of Treasury Regulations 111. The Commissioner disallowed the exclusions, and the Tax Court upon petition for redetermination, affirmed the disallowances.[1]

The provision of the statute relating to the $1,500 exclusion was, in the years involved, as follows:

> "Additional allowance for military and naval personnel.
>
> "(A) In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such a war, or, in the

[1] William I. Connelly, 8 T. C. 848 (1947).

case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, so much of such compensation as does not exceed $1,500."

The provision of the Regulations relating to the claimed $2,171.10 is as follows:

"The value of quarters furnished to the commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Army, Navy, Coast Guard, Coast and Geodetic Survey, and Public Health Service, or amounts received by them as commutation of quarters, are to be excluded from gross income . . . ."

The commutation of quarters problem is quickly solved. Petitioner[2] was furnished no quarters and received no commutation of quarters. The view of the Tax Court on that item was plainly correct.

The statutory allowance for naval personnel presents a different question. Prior to March 1, 1942, petitioner was employed in the Office of the Solicitor of the Department of Commerce. On that day, his group was transferred by Executive Order No. 9083[3] to the Coast Guard, and he with it. On the 19th of February, 1943, he was enrolled as a Lieutenant Commander in the Coast Guard Reserve, took the oath of office, and was placed on full-time active duty. He was officially notified: "While on active duty, you are vested with all the rights, privileges, powers and duties of a regular member of the Coast Guard Reserve of the same rank or rating, and you are subject to all laws and regulations for the government of the Coast Guard and its Reserve." Thereafter, he was under authority of the Coast Guard twenty-four hours a day and was subject to its laws, regulations and orders and to naval disciplinary action for offenses committed. He was required to wear the Coast Guard uniform, was authorized to wear campaign ribbons and to use the postal franking privilege and the naval mess, received a naval personnel ration card, and had access to medical facilities of the Navy. According to an Office Memorandum issued by the Commandant of the Coast Guard on July 24, 1943, upon the subject:

"2. It is desired to impress upon all heads of offices, chiefs of divisions, and all regular and Reserve personnel that, while engaged on active duty, as set forth and described in his certifi-

[2] For simplicity's sake, we shall use that term to refer to the husband.
[3] 7 FED. RE. 1609.

cate of temporary enrollment, a temporary member of the Reserve has the same power, authority, rights and privileges as members of the regular Coast Guard of similar rank, grade, or rating in the execution of the duty assigned to him.

* * * * * *

"6. The attention of heads of offices and chiefs of divisions is invited to the fact that one of the principal reasons for the induction of civil service employees into the military establishment as temporary members of the Reserve was to obtain a homogeneous organization on a military basis and to eliminate differences in procedure and practices applicable to military personnel and civil service personnel engaged on exactly the same duty; and this memorandum is issued in order to effectuate that policy."

On the other hand, petitioner was not exempt from liability for training and service under the Selective Training and Service Act of 1940, as amended. During the period of his enrollment, he continued to receive for his services and the duties assigned to him compensation from congressional appropriations allocated to pay for civilian positions. Deductions for Civil Service retirement were continued, and petitioner was still governed by Civil Service regulations for annual and sick leave and received overtime pay for services in excess of 40 hours a week.

The Commissioner of Internal Revenue disallowed the exclusion upon the ground that Commander Connelly was serving "in a civil status" and received his pay "from a civilian government payroll". The Tax Court held that he was not a commissioned officer.

The dispute arises on account of two features of the case. The duties which were performed by Commander Connelly's organization, and by him, as part of the Coast Guard, under naval command, during the war, were the same as, or similar to, the duties which they had performed in the Department of Commerce before the war and before their transfer and induction. This similarity, or identity, of duties seems to cause vast confusion. Because of it, Commander Connelly is said not to be an officer in the Coast Guard.

We do not see how similarity of duties can erase the distinction between civilian and military service. If it be attempted, an appalling confusion would arise. All sorts of questions would be presented as to the thousands of industrialists who were inducted or commissioned and assigned to operate plants, or to command patrol boats, and as to military personnel on duty at the Pentagon, and as to quartermaster and supply corps personnel dealing in clothing and equipment, and so on *ad infinitum*. We do not know why the Executive Department of the Government chose to translate

each of scores of civilian operations into military and naval operations for the conduct of the war; and to induct into the military and naval services the accompanying personnel. And it is not our function to inquire why, although common sense indicates that total war is best conducted by military methods, means and men throughout. We know that it was done, and that is sufficient for our purposes.

We had a somewhat similar problem in *Mitchell* v. *Cohen*.[4] We there pointed out that the critical characteristics which differentiate civilian from military personnel have long been established.[5] The oath of office is the major incident. We need not repeat the extended discussion of that opinion. The Supreme Court defined ex-servicemen "for the purpose of [that] particular statute," as not including the particular persons there involved.[6] But the Court did not reject or question the standards which we there recited for the determination of status, as civilian or military, generally. Therefore, we adhere to those views for purposes other than that statute. The situation is not unlike the transformation of status from the bar to the bench. One minute a person has no power save his own influence and receives compensation for his legal opinions. Two minutes later he is invested with lawful power over life and property, and the receipt of compensation for his opinions is a felony. The sole occurrence in those two minutes has been that he took an oath of office, pursuant to appointment and designation of duty.

It is our view that if the courts embark upon a process of separating military from non-military status for each and every recurrent purpose, upon the basis of an evaluation of time, pay, duty, privileges, etc., the process will be interminable and the ultimate result complete chaos. The enthusiasm, the panegyrics, and indeed the real and dire necessity, with which government translates personnel from civilian to military status for the purposes and needs of war, and the equal and opposite rescission of those attitudes when the war is over, are notorious in history and fiction. Of course, Congress may make differentiations and classifications almost as it pleases. But when Congress chooses not to make them, it is not for the courts to do so. When, for purposes of war, the Executive Department translates civilian duties into military duties and inducts personnel from civilian status to military status, and when Congress enacts legislation applying to military duties and

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[4] 82 U. S. App. D. C. 83, 160 F. 2d 915 (1947).

[5] *United States* v. *Tyler*, 105 U. S. 244, 26 L. Ed. 985 (1882); *United States* v. *Morton*, 112 U. S. 1, 28 L. Ed. 613, 5 S. Ct. 1 (1884); *Billings* v. *Truesdell*, 321 U. S. 542, 88 L. Ed. 917, 64 S. Ct. 737 (1944); and other cases cited in *Mitchell* v. *Cohen*, *supra*.

[6] 333 U. S. 411, 421, 92 L. Ed. ——, 68 S. Ct. 518 (1948).

military personnel, without further definition, the courts should simply accept those determinations. In such cases, the courts, in our view, should simply apply the long-established criteria—oath of office, military duty, and subjection to military discipline.

We are urged to ascertain an unexpressed intendment in the revenue act. The language of that act is direct and unadorned. It grants an allowance "In the case of compensation received . . . for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war". If Commander Connelly fits those clear requirements, he is entitled to the allowance. We think that no hindsight, subtlety or assumed mental reservation on the part of Congress should deprive him of it.

The Tax Court held the Commander to be not a commissioned officer because he was not commissioned by the President, but instead was inducted into office directly by the Coast Guard authorities. The Tax Court relied upon Section 6 of Title 14, United States Code. But the Coast Guard Auxiliary and Reserve Act of 1941[7] provides that the Commandant of the Coast Guard may confer upon these men the same ranks as are provided for the regular Coast Guard. By that statute, for the purposes of that war, the Commandant could confer upon certain persons the rank and status of a commissioned officer. He did so in the case of this petitioner. Commander Connelly had the authority, the title, the duties and the obligations of a commissioned officer. He was sworn in as such, by congressional authority. He was certainly serving and acting "as a commissioned officer", and that is what the tax statute requires.

The second feature which gives rise to the dispute, is the nature of petitioner's pay. He was on full-time active service, and he was compensated. But the Commissioner points to that part of the Coast Guard Auxiliary and Reserve Act (Sec. 207, *supra* note 7) which referred to the enrollment of "Government employees without pay other than the compensation of their civilian positions". He argues that petitioner, being in that category, did not receive "military pay". The revenue act does not use that term. Its term is "compensation . . . for active service". To reach the conclusion that petitioner's compensation was not for service in the naval forces, we would have to hold that he worked full time for no compensation while, at the same time, he received full compensation for no work. The facts are that he was engaged in full-time active duty in the naval forces, and he received compensation. We think he received the compensation for the work.

[7] Sec. 207, 55 STAT. 12, as amended, 56 STAT. 329, 990, 1021 (1942).

It is our conclusion that this petitioner received compensation for active service as a commissioned officer in the naval forces of the United States during the war. That he was on such service as such an officer was by executive action pursuant to congressional authority. That his induction and status were not accomplished by the usual peacetime formalities, and that his pay was specified by a congressional enactment apart from other more general specifications of pay for military or naval service, are immaterial. It is not for the courts to tell the executive and legislative branches how they should have conducted the war. Petitioner is, therefore, entitled to the allowance of $1,500 as an exclusion from income for income tax purposes, under Section 22(b)(13)(A) of the Internal Revenue Code. The judgment of the Tax Court is, therefore, reversed on that point.

*Reversed in part, affirmed in part, and remanded for further proceedings in accordance with this opinion.*

EDGERTON, J., *dissenting in part*: I think the Tax Court was right. The petitioner has no claim to the statutory privileges of "ex-servicemen," *Mitchell* v. *Cohen*, 333 U. S. 411, and it seems to me still clearer that a man who was not commissioned was not "a commissioned officer"; also, that a man subject to draft was not a commissioned officer. Even if he had been a commissioned officer I would be unable, in view of the rule that tax exemptions are strictly construed, to say that the compensation of a man who did not receive a commissioned officer's pay but served "without pay other than the compensation of [his] civilian positions" was "received . . . for active service as a commissioned officer."

United States Court of Appeals for the District of Columbia Circuit. Filed Jan. 24, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit, January Term, 1949

No. 9620

WILLIAM I. CONNELLY AND BERTHA CONNELLY, PETITIONERS,

*vs.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*On Petition for Review of Decision of Tax Court of the United States*

Before: EDGERTON, CLARK and PRETTYMAN, JJ.

*Judgment*

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of the said Tax Court on review in this cause be, and the same is hereby, reversed in part and affirmed in part, and that this case be, and it is hereby, remanded to the said Tax Court for further proceedings in accordance with the opinion of this Court.

Per Circuit Judge Prettyman.

Dated January 24 1949.

Opinion by Circuit Judge Edgerton dissenting in part.

United States Court of Appeals for the District of Columbia Circuit. Filed April 1, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 9620

WILLIAM I. CONNELLY AND BERTHA CONNELLY, PETITIONERS,

*vs.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Designation of Record*

The Clerk will please prepare a certified transcript of record for use on petition for certiorari to the Supreme Court of the United States in the above-entitled cause, and include therein the following:

1. Joint Appendix to Petitioners' Brief.

2. Opinion of the Court of Appeals.

3. Judgment of the Court of Appeals.

4. This Designation.

5. Clerk's Certificate.

PHILIP B. PERLMAN,
*Solicitor General,*
*Counsel for Respondent.*
CAESAR L. AIELLO,
A. MURRAY PRESTON,
*Counsel for Petitioners.*

March 31, 1949.

United States Court of Appeals for the District of Columbia Circuit

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 60, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of William I. Connelly and Bertha Connelly, Petitioners, v. Commissioner of Internal Revenue, Respondent, No. 9620, January Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fourth day of April, A. D. 1949.

[SEAL]

JOSEPH W. STEWART,
*Clerk of the United States Court of Appeals for the District of Columbia Circuit.*

In the Supreme Court of the United States, October Term, 1948

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

WILLIAM I. CONNELLY AND BERTHA CONNELLY, RESPONDENTS

*Stipulation*

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Joint Appendix to Petitioners' Brief.

2. Proceedings had before the United States Court of Appeals for the District of Columbia.

It is further stipulated and agreed that Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on petition to the United States Court of Appeals for the District of Columbia Circuit; and that, in the event that the petition for certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcript of record on petition to that court as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

PHILIP B. PERLMAN,
*Solicitor General,*
*Counsel for Petitioner.*
CAESAR L. AIELLO,
*Counsel for Respondents.*

March 31, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE 1949 932004 941

Supreme Court of the United States

*Order allowing certiorari*

Filed June 6, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

---

COMMISSIONER OF INTERNAL REVENUE, Petitioner

v.

WILLIAM I. CONNELLY AND BERTHA CONNELLY

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on January 24, 1949.

### OPINIONS BELOW

The findings of fact and the opinion of the Tax Court (R. 31-40) are reported at 8 T.C. 848. The opinion of the Court of Appeals (R. 54-59) and the dissenting opinion of Judge Edgerton (R. 59) have not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1949. (R. 60.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

The taxpayer, while holding a Civil Service position with the Coast Guard at its headquarters, became enrolled as a full-time temporary member of the Coast Guard Reserve in the classification known as "Coast Guard Civil Service Employees", and served without compensation other than the compensation of his civilian position which he continued to hold throughout his enrollment.

The question presented is whether the taxpayer was entitled to exclude $1,500 from his taxable income for the years 1943 and 1944 under the provisions of Section 22(b)(13)(A) of the Internal Revenue Code which grants such an exclusion from compensation received for active service as a commissioned officer in the military or naval forces.

## STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 13-17.

## STATEMENT

The taxpayers are husband and wife, residing in Falls Church, Virginia. In 1943, William I. Connelly, who will hereafter be referred to as the

taxpayer, was a Civil Service employee of the United States, serving in the Legal Division of the Coast Guard. In February, 1943, the taxpayer was enrolled as a temporary member of the Coast Guard Reserve for the duration of the war, and was ordered to full-time duty at Coast Guard Headquarters in Washington, D. C. By the terms of his enrollment, the taxpayer was to receive no pay or allowances other than the compensation of his civilian position which he continued to hold, and his duties were to be performed in the classification known as "Coast Guard Civil Service Employees". (R. 16, 19-20, 32, 33-34.)[1]

At the time of his enrollment, the taxpayer's Civil Service position was grade P-5 and he was enrolled in the Reserve with the rank of Lieutenant Commander. In April, 1944, his Civil Service position was reclassified to grade P-6. He was thereupon disenrolled from his rank of Lieutenant Commander and was re-enrolled with the rank of Commander. (R. 33-34.)

During the period of his enrollment, the taxpayer continued to receive compensation for his services at the applicable Civil Service professional rates, which was paid from appropriations allocated to the payment of salaries of Civil Service positions. As in the case of other civilian em-

[1] For a description of the temporary classes of the Coast Guard Reserve during the war see *Mitchell* v. *Cohen*, 333 U. S. 411, 413-414.

ployees, the taxpayer was subject to Civil Service regulations covering annual and sick leave, deductions for Civil Service retirement were taken from his pay, and he received over-time compensation for work performed in excess of 40 hours of service per week. (R. 33.) In the case of injury in the line of duty, the taxpayer was entitled to the same benefits as Civil Service employees of the United States; in the case of sickness contracted while performing duty, he was entitled to the same hospital and medical treatment afforded members of the regular Coast Guard. (R. 35.) His temporary enrollment in the Coast Guard Reserve did not exempt the taxpayer from induction under the Selective Service and Training Act and, apparently, his disenrollment could be secured at his own convenience, as well as on the initiative of the Coast Guard. (R. 33-34, 35-36.) While on active duty, the taxpayer was vested with the same power and authority as members of the regular Coast Guard of similar rank. He was also subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while so subject. (R. 34.) The taxpayer was disenrolled in September, 1945. (R. 35-36.)

The taxpayer received total civilian pay of $5,872.04 in 1943, $5,802.08 in 1944. In his tax return for each year, he claimed an annual exclusion from income of $1,500 under Internal Reve-

nue Code, Sec. 22(b)(13)(A), which was disallowed by the Commissioner of Internal Revenue. (R. 36.) The Tax Court held that the taxpayer was not entitled to the exclusion. (R. 36-40.) The Court of Appeals, Judge Edgerton dissenting (R. 54-59), reversed the decision of the Tax Court.

## SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the taxpayer was entitled to the $1,500 exemption provided in Section 22(b)(13)(A) of the Internal Revenue Code.

2. In disregarding and failing to follow the holding and opinion of this Court in *Mitchell* v. *Cohen*, 333 U.S. 411, and in following its own opinion in that case, 160 F. 2d 915.

3. In reversing the judgment of the Tax Court.

## REASONS FOR GRANTING THE WRIT

The Court of Appeals for the District of Columbia Circuit, relying on its own opinion in *Mitchell* v. *Cohen*, 160 F. 2d 915, and ignoring the reasons which prompted this Court to reverse that decision (333 U.S. 411), has again extended to temporary members of the Coast Guard Reserve one of the series of special benefits which Congress has granted to persons who served in the armed services during the war—in this case the exclusion from taxable income of $1,500 provided for in Section 22(b)(13)(A) of the Internal Revenue Code (Appendix, *infra*, pp. 15-16). Unless reversed, the

decision will stand as a precedent respecting the tax liability of some hundreds of persons who were enrolled as temporary members of the Coast Guard Reserve on the same basis as the taxpayer. And if the Court of Appeals, ignoring what was reversed and repudiated in the *Cohen* case, should continue—as it did here and as it announces its intention to continue (R. 57)—to rely on its own opinion in that case, there is the constant danger that other statutory benefits intended for full-fledged servicemen will be erroneously extended by it to persons in the class of the taxpayer. Above all, the decision of the Court of Appeals, in its refusal to follow the plain teaching of this Court's opinion in the *Cohen* case, has a decidedly erosive effect on the precedential value of this Court's decisions, and this Court's supervisory authority should be exercised in the interest of the proper administration of justice in the federal courts.

1. Section 22(b)(13)(A) of the Internal Revenue Code, granted an exemption from income tax to the extent of $1,500 of compensation received "for active service as a commissioned officer * * * in the military or naval forces of the United States * * *." The court below concluded that the taxpayer, who became enrolled as a temporary member in the Coast Guard Reserve in the "Coast Guard Civil Service Employees" classification, was entitled to this exemption even though he continued to hold his Civil Service position with the

Coast Guard, continued to receive his full Civil Service salary (including overtime) out of funds appropriated for such purposes, concededly received no military pay, and continued to do essentially the same kind of work that he had performed prior to his enrollment—all in accordance with the explicit understanding at the time of his enrollment. Refusing "to ascertain an unexpressed intendment in the revenue act" (R. 58), the Court of Appeals rested its decision solely on the taxpayer's status as a commissioned officer in the naval forces. In doing so, the court expressly applied the criteria which it had applied in the *Cohen* case, and declared its continued adherence to those views for purposes other than the precise statute involved in that case, flatly asserting that this Court, except for that particular act, did not reject or question those standards "for the determination of status, as civilian or military, generally" (R. 57).

Actually, this Court's opinion in the *Cohen* case, in the plainest manner possible, ruled that the question of "status" was beside the point, and that the Court of Appeals had misconceived the issue when, looking only to the difference between civilian and military status, it blindly applied the literal words of the Veterans Preference Act of 1944, c. 287, 58 Stat. 387, to confer preferential rights on part-time, temporary members of the Coast Guard Reserve. This Court thought it im-

material that Cohen had rendered part-time active service in a branch of the armed forces and was therefore an ex-serviceman within the literal words of the statute. Instead, the Court measured the military services performed by these temporary reservists against the purposes which prompted Congress to establish this preferential treatment, and concluded that Congress did not use the statutory term "ex-servicemen" in that Act in its broadest sense, and that, instead, the benefit was granted (p. 421)—

> only to those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life. * * *

2. The rationale of the *Cohen* decision unquestionably compels a comparable result in the present case. Just as with the Veterans Preference Act, the legislative purpose of the related statutes involved here makes it evident that Congress did not intend this special tax exemption to be available to persons, like the taxpayer, who were receiving civilian pay, who were still performing essentially the same functions, and who were not subject to major dislocations in their normal civilian affairs. Instead, because of the financial sacrifice made by most persons who entered the armed services, the statute was primarily supposed to constitute some measure of relief against the general disparity in the levels of civilian and military compensation. The exclusion was designed "to

assist a member of the military forces to enable him to meet the problem of taxation arising from his transition from a civilian to a military status"; it was to be applicable only with respect to compensation received for services performed in the military or naval forces, being "limited to income derived entirely from * * * service as a member of the military or naval forces" and not being applicable to income received by a serviceman "in addition to his military or naval pay." 89 Cong. Rec. 2754-2755. See also: H. Rep. No. 2333, 77th Cong., 2d Sess., p. 6 (1942-2 Cum. Bull. 372, 376), and S. Rep. No. 1631, 77th Cong., 2d Sess., p. 81 (1942-2 Cum Bull. 504, 566) (reporting on the Revenue Act of 1942, where a special exemption, limited to personnel below the grade of commissioned officers, first originated); H. Rep. No. 268, 78th Cong., 1st sess., pp. 12-13, 26-27 (reporting on H. R. 2218); H. Rep. No. 401, 78th Cong., 1st sess., pp. 21, 41 (1943 Cum. Bull. 1283, 1299, 1313), and S. Rep. No. 221, 78th Cong., 1st sess., pp. 13-14, 47-48 (1943 Cum. Bull. 1314, 1324, 1349) (reporting on the Current Tax Payment Act of 1943); S. Rep. No. 655, 79th Cong., 1st sess., pp. 34-35 (1945 Cum. Bull. 621, 648), and H. Conference Rep. No. 1165, 79th Cong., 1st sess., p. 8 (1945 Cum. Bull. 654, 655-656) (reporting on the Revenue Act of 1945).

Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941 (Appendix, *infra*, pp. 13-14),

under the terms of which the taxpayer was enrolled, is the same statute which was involved in the *Cohen* case. Its legislative history and the incidents of temporary enrollment in the Reserve plainly show that persons in the position of the taxpayer were no more entitled to the special tax exemption here involved than the part-time temporary reservists were entitled to the employment preference involved in the *Cohen* case. The phrase in Section 207 of the Coast Guard Reserve Act permitting enrollment of "Government employees without pay other than the compensation of their civilian positions" was expressly inserted to make it clear that these employees could serve "without military pay but with continuance in their civilian positions and the receipt of compensation thereof." H. Rep. No. 2525, 77th Cong., 2d sess., p. 3 (1942). The report significantly continues by saying that, in permitting service of such Government servants "without the pay of their military rank or rating", the statute would not interfere with their right "to receive the compensation of their civilian positions" and that there would "be little, if any, change in the nature of their duties after enrollment." The primary purpose was to give these civilian employees "military authority and responsibility." It is indisputable, therefore, that the Act under which the taxpayer was enrolled specifically denied him the military pay with which alone the income tax exclusion was concerned.

We need add little to the further factors enumerated in the *Cohen* case, most of which are also applicable to the taxpayer, except to observe that persons, like the taxpayer, who continued to draw the full Civil Service pay of their civilian position in the Government, can scarcely have been considered by Congress as needing or as being entitled to the tax exemption afforded to those whose services in the military and naval forces was compensated on an altogether different standard—a standard which did not conceive of a normal work week limited to 40 hours of service or of overtime compensation.

3. The just and efficient disposition of the business of the federal courts requires this Court's decisions, and the reasons supporting them, to be accorded by the lower courts more than the formal obeisance rendered *en passant* by the Court of Appeals to *Mitchell* v. *Cohen*. By the certiorari mechanism the Court is largely enabled to restrict its review to selected cases in significant fields, and the opinions in those cases serve as a guide for the determination of related issues by the other federal tribunals, without the necessity of a continuous process of detailed decision and policing by this Court. This system cannot operate effectively in the face of the less-than-lip-service of which the present case appears to us to be a stark example. It is mainly for this reason that we do not hesitate to present to the Court, for the second

time within as many terms, a question concerning the benefits available to wartime temporary members of the Coast Guard Reserve.

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

APRIL 1949.

## APPENDIX

1. Coast Guard Auxiliary and Reserve Act of 1941, c. 8, 55 Stat. 9:

Sec. 206 [as amended by the Act of July 11, 1941, c. 290, 55 Stat. 584, Section 10; by the Act of June 6, 1942, c. 385, 56 Stat. 329, Section 1(3); and by the Act of November 23, 1942, c. 639, 56 Stat. 1020, Section 2(4)]. Commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Reserve when engaged on active duty, on active duty while undergoing training, on training duty with pay, or when engaged in authorized travel to or from such duty, shall receive the same pay and allowances as are received by commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Naval Reserve of the same rank, grade, rating, and length of service; pay and allowances of cadets of the Reserve shall under the same conditions, for the same purposes, and in the same manner, be assimilated to the pay and allowance of midshipmen of the Naval Reserve. * * *

(14 U.S.C. 306.)

Sec. 207 [as amended by the Act of June 6, 1942, *supra*, Section 1 (4); the Act of October 26, 1942, c. 628, 56 Stat. 990, and the Act of November 23, 1942, *supra*, Sec. 2]. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a

part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motor-boat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States, or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve. (14 U.S.C. 307.)

SEC. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval

Reserve, and no member of the Reserve, other than temporary members thereof, shall be a member of any other naval or military organization except the Auxiliary or the Coast Guard as provided for in sections 214 and 215 of this title: *Provided*, That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated.

(14 U.S.C. 1946 ed., Sec. 308.)

2. Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(13) [As added by Section 117 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as amended by Section 7 (a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and as further amended by Section 141 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556]. *Additional Allowance for Military and Naval Personal.*—

(A) In the case of compensation received during any taxable year and be-

fore the termination of the present war as proclaimed by the President, for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war, or, in the case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, so much of such compensation as does not exceed $1,500.

(B) Compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a member below the grade of commissioned officer (or commissioned warrant officer) in the military or naval forces of the United States during such war.

(26 U.S.C. 1946 ed., Sec. 22.)

3. Revenue Act of 1945, c. 453, 59 Stat. 556:

SEC. 141. ADDITIONAL ALLOWANCE FOR MILITARY AND NAVAL PERSONNEL.

* * * * *

(b) *Taxable Years to Which Applicable.*—Subparagraph (A) of section 22 (b)(13), as amended by subsection (a) of this section, shall be applicable with respect to taxable years beginning after December 31, 1942; subparagraph (B) thereof shall be applicable

with respect to taxable years beginning after December 31, 1940

* * * * *

4. Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(b)(13)-1 [As amended by T.D. 5508, 1946-1 Cum. Bull. 27]. *Compensation of Members of Military and Naval Forces.*—

* * * * *

(b) * * *

The exclusions under section 22 (b)(13) and this section are applicable only to compensation received prior to the termination of the present war to be fixed by proclamation of the President. * * * For the purposes of this section the military and naval forces of the United States include (but are not necessarily limited to) the Army, the Navy, the Marine Corps, the Coast Guard, the Army Nurse Corps, Female, the Navy Nurse Corps, Female, the Women's Army Auxiliary Corps or the Women's Army Corps, the Women's Reserve branch of the Naval Reserve, the Marine Corps Women's Reserve, and the Coast Guard Reserve, including the Coast Guard Women's Reserve.

* * * * *

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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 57

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

WILLIAM I. CONNELLY AND BERTHA CONNELLY

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The findings of fact and the opinion of the Tax Court (R. 31-40) are reported at 8 T.C. 848. The opinion of the Court of Appeals (R. 54-59) and the dissenting opinion of Judge Edgerton (R. 59) are reported at 172 F. 2d 877.

### JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1949. (R. 60.) The petition for a writ of certiorari was filed April 21, 1949, and granted June 6, 1949. The jurisdiction of this Court rests upon 28 U.S.C. 1254.

## QUESTION PRESENTED

Whether taxpayer, who while holding a civil service position with the Coast Guard became enrolled as a full-time temporary member of the Coast Guard Reserve and served without compensation other than that of his civilian position which he continued to hold throughout his enrollment, is entitled to exclude $1,500 from his taxable income for the years 1943 and 1944 under the provisions of Section 22 (b) (13) (A) of the Internal Revenue Code which grants such exclusion for compensation received for active service as a commissioned officer in the military or naval forces.

## STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in Appendix A, *infra*, pp. 41-46.

## STATEMENT

The taxpayers are husband and wife. In 1943, William I. Connelly, who for convenience will hereafter be referred to as the taxpayer, was a civil service employee of the United States, serving in the Legal Division of the Coast Guard. On February 19, 1943, the taxpayer was enrolled as a temporary member of the Coast Guard Reserve and was ordered to full-time duty at Coast Guard Headquarters in Washington, D. C. By the terms of his enrollment, he was to receive no pay or allowances other than the compensation of his civilian position which he continued to hold, and his duties were to be performed in the classification known as

"Coast Guard Civil Service Employees." (R. 16, 19-20, 32-33, 34.)

At the time of his enrollment, taxpayer's civil service position was grade P-5 and he was enrolled in the Reserve with a rank of Lieutenant Commander. In April, 1944, his civil service position was reclassified to grade P-6, whereupon he was disenrolled from his rank of Lieutenant Commander and was re-enrolled with the rank of Commander, pursuant to the recommendation of the Chief Counsel of the Coast Guard whose recommendation was in accordance with the conditions set forth in the Coast Guard Commandant's Memorandum of March 10, 1944, pertaining to the promotion of members of the temporary Reserve at Coast Guard Headquarters, who were also civilian employees. (R. 33-34.)

During the period of his enrollment, the taxpayer continued to receive compensation for his service at the applicable civil service professional classification rates, which was paid from appropriations allocated for the payment of salaries of civil service positions. As in the case of other civilian employees, the taxpayer was subject to civil service regulations covering annual and sick leave, deductions for civil service retirement were taken from his pay, and he received overtime compensation for work performed in excess of forty hours per week. (R. 33.) In the case of injury in the line of duty, the taxpayer was entitled to the same benefits as civil service employees of the United States. In

the case of sickness contracted while performing duty, he was entitled to the same hospital and medical treatment afforded members of the regular Coast Guard, but not including dental care. (R. 35.) His temporary enrollment in the Coast Guard Reserve did not exempt him from training and service under the Selective Training and Service Act. By the terms of his enrollment, he was entitled to only such other benefits and privileges as "may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations." (R. 35.) While on active duty, the taxpayer was vested with the same power and authority as members of the regular Coast Guard of similar rank, but the office memorandum of the Commandant of the Coast Guard outlining the extent of taxpayer's military authority stated that the Commandant "desires to make it crystal clear that there is a definite distinction between the military status and activities of a temporary member of the Reserve and the determination of the benefits—particularly with regard to pecuniary benefits—that derive to such temporary members in the Coast Guard Reserve." (R. 30.) Taxpayer was also subject to the laws, regulations and orders of the Coast Guard and to disciplinary action while so subject. (R. 29-31, 34.)

The taxpayer was disenrolled on September 15, 1945. The original disenrollment form issued by Coast Guard Headquarters stated the reason for

disenrollment was "For his own convenience", and that the type of service was "Coast Guard Civil Service Employee, without military pay." Taxpayer filed a written protest specifically objecting to this description of his "Record of Service", and the first form was then followed by another stating the reason for disenrollment as "completion of service because of satisfactory completion of assigned duties." The second disenrollment described the type of duty performed as "Chief of Admiralty and Maritime Section having civil service status, receiving civilian but no military pay, and holding rank of Commander as a Temporary Member of the Coast Guard Reserve." (R. 35-36.)

The taxpayer received total civilian pay of $5,872.04 for 1943 and $5,802.08 in 1944. In his tax return for each year, he claimed the annual exclusion of $1,500, provided under the Internal Revenue Code, Section 22 (b) (13) (A), which was disallowed by the Commissioner of Internal Revenue. (R. 36.) The Tax Court held that the taxpayer was not entitled to the exclusion (R. 36-40), but the Court of Appeals, Judge Edgerton dissenting (R. 54-59), reversed the decision of the Tax Court.

## SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding that the taxpayer was entitled to the $1,500 exemption provided by Section 22 (b) (13) (A) of the Internal Revenue Code.

SUMMARY OF ARGUMENT

The circumstances of taxpayer's Coast Guard service require denial of the claimed Section 22(b)(13)(A) service-pay exemption,[1] and reversal of the Court of Appeals, on the authority of *Mitchell* v. *Cohen*, 333 U. S. 411. The Court of Appeals determined the statute's application in this case, as it had in *Cohen*, solely by reference to the taxpayer's "military status," and refused to go any further than to inquire whether taxpayer was a commissioned officer in the Coast Guard. But this Court's *Cohen* opinion has made it clear that in this field "dictionary definitions" must give place to the Congressional purpose and the statutory scheme. That case involved another of the special benefits afforded to members of the armed forces—the right to veterans' preference—as it applied to one of the classifications of temporary Coast Guard members enrolled under the same statute which authorized taxpayer's service. The Court, although agreeing that the temporary reservist might come within one of the literal meanings of the controlling word in that statute, "ex-servicemen", held that he was not entitled to preference because he never ceased to be a civilian and was therefore not within the purpose of the Veterans' Preference Act to assist servicemen

[1] Excluding up to $1500 "of compensation received * * * for active service as a commissioned officer * * * in the military or naval forces of the United States" during World War II. Appendix A, *infra*, pp. 44-45.

divorced from civilian status in finding employment on their return.

Similarly, here, even on the assumption that taxpayer's situation meets the literal language of the Internal Revenue Code, the clear objective inherent in the statute and confirmed by the legislative materials—to render financial assistance to those cut off from their civilian sources of income—precludes the granting of the exemption to the taxpayer who in the financial sense with which the Code provision is concerned never ceased to be a civilian. At the time of his enrollment as a temporary Lieutenant Commander in the Coast Guard Reserve, he was a civilian attorney of the Coast Guard in the civil service classification, P-5. Under the terms of his enrollment he was to serve without military pay or allowances but was to continue to receive his civil service salary and to retain all other aspects of his civil service status. This included, in addition to the salary of his grade—paid from appropriations earmarked for civilian salaries—overtime pay, deduction for civil service retirement, and annual and sick leave. He was, moreover, actually promoted from grade P-5 to P-6 during his military service and thereafter received the increased compensation of a P-6. He probably could resign for his "own convenience" and could not be transferred without his permission. It was understood that he was to continue to do essentially the same kind of work that he had performed prior to his enrollment. These facts

of his military service show that the economic fabric of his civilian life remained intact during that service and ineluctably direct the denial of the exemption intended to assist those full-fledged members of the armed forces whose economic position was generally disrupted by virtue of their service.

Actually, this case is a stronger one for the denial of the claimed benefit than was *Cohen* because here, in addition to the taxpayer's being plainly outside the Congressional objective, he also fails to meet the literal provisions of the statute, which exempt from taxation the first $1,500 of "compensation received * * * for active service as a commissioned officer." The fact is that none of his compensation was received for service as a Coast Guard officer; all of it was received for service as a Coast Guard civil service employee, which he continued to be. The provisions of Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, and its legislative history show that the purpose of giving military status to civil service employees was to solve the administrative impasse resulting from having civilians in a military chain of command. The problem was resolved by continuing them in their civilian positions while at the same time granting them military rank and authority, and not by making them full-fledged members of the armed forces. This was the same procedure which was applied to other classifications of temporary

reservists employed in private industry, who continued to do the work of the private employer for the regular compensation paid by that employer but at the same time were on full-time active duty as temporary members of the Coast Guard without military pay.

The conclusion of the Court of Appeals that because taxpayer performed full-time active duty as an officer of the Coast Guard, the civil service pay he received was necessarily compensation for duty as a commissioned officer is a confusion of thought caused by the circumstance that taxpayer's civilian employer was the United States and, therefore, also his military employer. It overlooks the incontestable fact that taxpayer continued as a civil service employee for which he received his compensation, just as other temporary members of the Coast Guard continued in private employment for which they received private compensation. Since taxpayer continued to occupy a civil service position and to perform the duties of that position, for which he was paid his civilian salary, while at the same time assuming the additional duties and some of the prerogatives of an officer for which he was not paid, it follows that he received no "compensation * * * for active service as a commissioned officer", and cannot avail himself of the exemption.

ARGUMENT

**A Temporary Wartime Officer of the Coast Guard Reserve Enrolled in the Classification, "Coast Guard Civil Service Employees", Was Not Entitled to the $1,500 Exclusion Provided by Section 22(b)(13)(A) of the Internal Revenue Code for Compensation for Active Service in the Military or Naval Forces**

This case is directly controlled by *Mitchell* v. *Cohen*, 333 U. S. 411. The taxpayer, like Cohen, was a temporary member of the Coast Guard Reserve with a unique military-civilian status, and he likewise seeks a special privilege intended to be granted only to those who were fully integrated into the armed forces. Just as the Congressional purpose in enacting the Veterans' Preference Act of 1944 denied Cohen any employment priority, so the purpose of Congress in enacting Section 22(b)(13)(A) of the Internal Revenue Code (Appendix A, *infra*, pp. 44-45), which provides an exclusion of up to $1,500 of the "compensation received * * * for active service as a commissioned officer," establishes that the taxpayer was not a member of the class intended to have the benefit of this exemption. And even if there were doubt as to the correctness of the decision in *Cohen*, no similar doubt can obtain here because, unlike the statute in *Cohen*, the literal words of the Internal Revenue Code provision clearly direct denial of the special benefit claimed by the taxpayer.

The Court of Appeals, whose views we discuss in some detail in part B, *infra*, thought that because taxpayer was a commissioned officer—as measured by the criteria of "oath of office, mili-

tary duty, and subjection to military discipline" —he necessarily satisfied the statute (R. 57-58). In doing so, it paid no heed to the admonishment it had received, in the reversal of its decision in *Cohen* (160 F. 2d 915), that the Congressional purpose is a relevant if not controlling consideration in the construction of statutes of this character. On the contrary, without any regard either to the legislative materials or the statutory structure, it simply refused to "ascertain an unexpressed intendment in the revenue act" (R. 58). Equally anomalous was its rejection of the clear statutory standard, which makes the nature of taxpayer's compensation controlling, in favor of its own characterization of the taxpayer's military "status," a standard for application of servicemen's and veterans' benefits which this Court had decisively repudiated in *Cohen*.

In developing our argument that the court below has ignored the controlling decision in this field and improperly granted a tax benefit where none is due, we will first discuss taxpayer's patently hybrid status, part military and part civilian, then discuss the impact of *Cohen* and the purpose of Congress in providing the exemption, and finally show the failure of taxpayer's case under the literal language of the Internal Revenue Code provision.

A. *Taxpayer's hybrid civilian-naval status.*

Like Cohen, the taxpayer was enrolled as a temporary member of the Coast Guard Reserve under

the authority of Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended (Appendix A, *infra*, pp. 41-42), which authorized the enrollment of persons "(including Government employees without pay other than the compensation of their civilian positions)" who by reason of special training and experience were deemed qualified. The enrollment, according to the statute, was to be "under such conditions" as the Commandant should prescribe and under a definition of "powers and duties" by him. Enrollees were to have rank appropriate to their qualifications.

As the Court pointed out in the *Cohen* opinion (p. 413), there were six classifications of temporary members created under the authority of Section 207 of the Coast Guard Auxiliary and Reserve Act:[2] (1) Full-time active duty with military pay and allowances; (2) Volunteer Port Security Force; (3) Pilots without pay and allowances other than for uniforms, but paid by their own companies; (4) Officers of Great Lakes vessels without pay and allowances other than for uniforms, but paid by their own companies; (5) Coast Guard police without pay and allowances; and (6) Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation for their civilian positions. Cohen was enrolled under the Volunteer Port classification; the tax-

[2] See Record p. 19 for the same classifications designated in somewhat different language.

payer, as a civil service employee of the Coast Guard. (R. 34.)

Other than the nominal differences inherent in their different classifications, the military status of Cohen and taxpayer appear to have been substantially identical. Just as the Court noted was true of *Cohen* (333 U.S. 411, 413-415), taxpayer took the oath of allegiance required of regular members of the Coast Guard (R. 22-23); he was enrolled "for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority," (R. 34), although in actual practice those in taxpayer's status apparently could resign for their "own convenience",[3] and taxpayer apparently did in fact resign for his own convenience (R. 35).[4] Unlike any regular member of the armed forces, but just as in Cohen's case, taxpayer was not subject to transfer away from Washington nor could he be given a different type of duty than that for which he was enrolled. (Pars. 5, 9 and 10, Commandant's Circular No. 5-46, Appendix B, *infra*, pp. 50-51, 53-54; Personnel Bulletin No. 3-43, Appendix B, *infra*, pp. 63-65.) In fact, taxpayer continued to perform the identical duties he had performed prior to his enrollment. (R. 24.) Taxpayer was given a "Certificate of Disenrollment" upon severance as a temporary reservist, honorable discharges and mustering-out pay not being pro-

[3] Personnel Bulletin No. 75-45, Appendix B, *infra*, p. 62.
[4] This is not entirely clear (R. 35-36).

vided. (R. 35-36; pars. 9 and 12, Commandant's Circular No. 5-46, Appendix B, *infra*, pp. 53, 54.)

As in the case of members of the Volunteer Port Security Force,[5] taxpayer was required to register, and were it not for his age would have been liable, for training and service under the Selective Training and Service Act (R. 35); unlike the regular armed forces' members he could belong to other Reserve organizations and upon orders to active duty therein, the Coast Guard was required to "forthwith" release him from active duty. (Section 208, Coast Guard Auxiliary and Reserve Act of 1941, Appendix A, *infra*, pp. 42-43.)

Like Cohen, if the taxpayer were injured or killed in the line of duty, he was entitled only to the benefits prescribed by law for civilian employees of the United States, although if illness or disease occurred while on duty, he was entitled to the same hospital, but not dental, care as a regular member of the Coast Guard. (R. 35; Section 212 of the Coast Guard and Auxiliary Act of 1941, as amended, Appendix A, *infra*, pp. 43-44.)

Taxpayer, differing from members of the Volunteer Port Security Force, was on active duty at all times. (R. 34.) Like members of the Security Force, however, he was vested with the same power and authority as members of the regular Coast Guard of similar rank while on active duty, and was subject to the laws, regulations and orders for the

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[5] 333 U.S. 411, 415.

government of the Coast Guard, and to disciplinary action for offenses committed while subject to such law. (R. 34; Section 209, Coast Guard Auxiliary and Reserve Act of 1941, Appendix A, *infra*, p. 43.)

As a result of administrative determination by the various governmental agencies involved, and of the decision in *Mitchell* v. *Cohen*, 333 U.S. 411, temporary members of the Reserve (except those on full-time active duty *with* military pay and allowances) have been denied all of the important special benefits granted by Congress to veterans. Such benefits include the right to preference in federal employment (*Mitchell* v. *Cohen*,[6] *supra*), the right to National Service Life Insurance, the other benefits administered by the Veterans Administration such as pensions, medical and hospital services and burial benefits, and the broad benefits under the Servicemen's Readjustment Act of 1944. (Administrator's Decision, Veterans Administration, No. 699, Appendix B, *infra*, pp. 65-85.)

The duties which taxpayer performed were the same as his civilian duties as a Senior Attorney, Legal Division, Coast Guard Headquarters. He received no military pay and allowances, but con-

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[6] Although the Court had before it only the rights of members of the Volunteer Port Security Force to preference, the opinion plainly covers those in taxpayer's status since the Court defined (333 U.S. 411, 421) persons covered by the Veterans' Preference Act as "those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life." Taxpayer received neither military pay and allowances nor was the fabric of his normal social and economic life disrupted. See *infra*, pp. 16, 26-27, 30-37, 39-40.

tinued to receive his civil service pay, grade P-5. Unlike the compensation of all regular members of the armed forces, taxpayer's pay continued to be paid from Congressional appropriations allocated to pay civilian salaries, deductions for civil service retirement were continued, and he received overtime pay in excess of forty hours per week. In addition, he was governed by civil service regulations for annual and sick leave. (R. 33.) As a matter of fact, "no phase" of taxpayer's civil service status was disturbed by his enrollment. (Personnel Bulletin No. 3-43, Appendix B, *infra*, p. 64.) And when his civil service classification was changed from P-5 to P-6, he was disenrolled as a Lieutenant Commander and enrolled as a Commander to rank retroactively from the date, March 16, 1944, on which his civil service position was reclassified. (R. 33.)

B. *Its legislative history and purpose show that the exemption was not designed to aid persons all of whose compensation remained civilian.*

We will show in part C, *infra*, that taxpayer received no compensation as a commissioned officer in the military or naval forces and hence fails to meet the literal requirements of Code Section 22(b)(13)(A). But even on the assumption that he can bring himself within the literal wording of the exemption, taxpayer is nevertheless not entitled to prevail because, just as the *Cohen* case held that temporary reservists were not the kind of "ex-serv-

icemen" to whom Congress intended to give federal job preference, so it is quite clear that taxpayer was not the type of commissioned officer whose compensation Congress desired to be afforded a preferential tax treatment.

1. The Court of Appeals for the District of Columbia Circuit decided both the *Cohen* case (160 F. 2d 915) and the instant one. The majority of the court, through Judge Prettyman who also wrote the *Cohen* opinion,[7] thought, as it had in *Cohen*, that the key to the problem was whether taxpayer had military "status" which it measured by "the long-established criteria—oath of office, military duty, and subjection to military discipline." (R. 58.) We do not here dispute, and it was not disputed in *Cohen*, that taxpayer had military status. The superficiality of the Court of Appeals' criteria of that status is apparent from part A, *supra*, where we have shown that taxpayer lacked many important prerogatives and benefits of a full-fledged officer while at the same time retaining most of the privileges of a civilian who is a civil service employee.

But this approach and these criteria were rejected in the plainest manner possible by this Court some ten months before this case was decided, when it reversed the Court of Appeals in *Mitchell* v. *Cohen*, 333 U. S. 411. The Court unmistakably

[7] Judge Edgerton dissented both in this case (R. 59) and in *Cohen*. He thought the correctness of the denial of the benefit here claimed was even "clearer" than that involved in *Cohen*.

held in *Cohen* that the question of "status" was beside the point, and that the Court of Appeals had misconceived the issue when, looking only to the difference between military and civilian status, it mechanically applied the literal words of the Veterans' Preference Act of 1944 to confer preferential rights on part-time temporary members of the Coast Guard Reserve. This Court held, on the contrary, that whether Cohen was an ex-serviceman within the statute's meaning must be determined "by an examination of the statutory scheme rather than by reliance upon dictionary definitions." (p. 418). An examination of the statute's purpose led the Court to conclude that Congress did not use the statutory term "ex-servicemen" in the broadest sense, but that the benefit of the statute was granted "only to those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life." (p. 421).

Notwithstanding the clarity with which this Court disapproved the Court of Appeals' approach to the *Cohen* problem, the Commissioner's reliance below on that authority, and the Court of Appeals' own acknowledgment that the problem here was "somewhat similar" (R. 57), the court again held that whether taxpayer's status was civilian or military was dispositive of the issue and applied its *Cohen* criteria of military status, *i.e.*, "oath of office, military duty, and subjection to military discipline." (R. 58.)

The Court of Appeals' fleeting obeisance to this Court's *Cohen* decision consisted of (1) the assertion that the underlying principles of the earlier decision were to be limited to the Veterans' Preference Act, without any suggestion as to why those principles should not be applied to the interpretation of the coverage of analogous legislation to those in similar circumstances (R. 57), and (2) the statement that "But the Court [Supreme Court] did not reject or question the standards which we there [*Mitchell* v. *Cohen*] recited for the determination of status, as civilian or military, generally." (R. 57). Since this Court rejected the relevance of "status" entirely, it was obviously not germane to its opinion to consider the specific criteria for applying the rejected standard. The lower court's implication that since the criteria had not been questioned the standard itself had not, was plainly a *non sequitur*. The standard of military "status" had been explicitly cast aside.

2. It is apparent from the statutory structure that the purpose of Congress in enacting Section 22 (b) (13) (A) of the Internal Revenue Code was in a sense the converse of that which motivated the Veterans' Preference Act. The purpose of the latter enactment, as the Court stated in *Mitchell* v. *Cohen*, 333 U. S. 411, 418-421, was to aid those veterans who had been completely divorced from their civilian employment, by reason of their military service, in obtaining reemployment and rehabilitation when they changed back from military to civil-

ian life; the obvious purpose of the income tax exemption was to assist members of the armed forces in meeting the financial dislocation caused by their complete divorcement from civilian status.

a. That Congress desired the benefit to take the form of an addition to military pay, measured by the amount of the tax on the excluded pay, is plain from Section 22 (b) (13) itself. That subsection does not, as might have been done, grant an exemption or exclusion of any or all income of the members of the armed forces, but limits the exemption to compensation received for active duty as a commissioned officer, or in the case of enlisted men, to compensation received for active duty as a member below the grade of commissioned officer. No exemption was granted to a member of the armed forces *qua* member, but as the statute plainly states, to the compensation received for active duty as a member of the armed forces.

There was in this provision a deliberate choice of benefiting armed forces' members by the amount of the tax on a portion of their military compensation rather than by a flat exemption of a portion of their income regardless of source. In view of the wording of the provision, no contention could be made that a commissioned officer, for example, with interest, or dividend income, or a civilian salary could exclude any part of such income from liability for the tax. We think it self-evident that the purpose in enacting this provision was a Congres-

sional desire to "increase" military compensation by the amount of the tax, on the assumption that those uprooted from their civilian position and compensation were in need of this additional financial assistance.[5] By the same token, the failure to adopt a plan of exempting a certain amount of income, as such, of military personnel must have been based on the assumption that those receiving income other than that attributable to their military service did not need a special exemption for such income. Thus, as was true in the *Cohen* case, the taxpayer's military status is beside the statutory purpose, and the essential test is the real nature and source of the taxpayer's compensation and its relation to his civilian life. Here, respondent admittedly continued to receive his civilian pay and received no separate military compensation.

b. The purpose of Congress to limit the exclusion to military remuneration received for active duty, i.e., to "military" or "service" pay, and its reason for so doing—that it was presumed that the recipients of such pay were generally subjected to a financial hardship as a result of their change from civilian to military compensation—are confirmed

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[5] Congress made the same distinction in another provision. It treated differently "service pay" and "gross income in addition to compensation for active service as a member of the military or naval forces of the United States" in providing for deferment of the tax on "service pay." Section 3808, Internal Revenue Code, added to the Code by Section 142 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556 (26 U.S.C. 3808).

by the hearings, the Committee Reports, and the Congressional debates.[9]

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[9] Although Section 22 (b) (13) (A) of the Internal Revenue Code, as amended by Section 141 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556, governs here because it was made applicable by Section 141 (b) of the 1945 Act (Appendix A, *infra*, pp. 45-46) to all years beginning after December 31, 1942, the legislative materials relating to Section 22 (b) (13) (A), as it was added to the Code by Section 117 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and as later amended by Section 7 (a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, are equally relevant in determining the purpose of the provision applicable to this case, because the basic structure of Section 22 (b) (13) (A) has remained unchanged since it was added to the Code by the 1942 Revenue Act. The various changes, none of them relevant to the present controversy, related only to the amount of the exclusion and to varying treatment of commissioned officers and enlisted men, and of married and unmarried enlisted men.

Section 22 (b) (13) of the Internal Revenue Code, as originally enacted by Section 117 of the Revenue Act of 1942, provided as follows:

> (13) *Additional allowance for military and naval personnel.*—So much of the amount received, before the termination of the present war as proclaimed by the President, by personnel below the grade of commissioned officer in the military or naval forces of the United States as salary or compensation in any form from the United States for active service in such forces during such war, as does not exceed $250 in the case of a single person and $300 in the case of a married person or head of a family. The determination, for the purposes of this paragraph, of the taxpayer's status in the armed forces and his family status shall be made as of the end of the taxable year.

As amended by Section 7 (a), Current Tax Payment Act of 1943, the Code provision was that:

> (13) *Additional allowance for military and naval personnel.*—In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, by a member of the military or naval forces of the United States for active service in such forces during such war, or by a citizen or resident of the United States who is a member of the military or naval forces of any of the other United Nations for active service in such forces during such war, so much of such compensation as does not exceed $1,500

The House Report relating to the 1942 amendment [10] shows that the provision was designed to offset the lowering of individual exemptions provided by the 1942 Bill. H. Rep. No. 2333, 77th Cong., 2d Sess., p. 6 (1942-2 Cum. Bull. 372, 377). The Senate Report (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 81 (1942-2 Cum. Bull. 504, 566)) stated that the provision was "intended to apply only to *salary* or compensation *received* by personnel [enlisted] *for active service* in the military or naval forces * * *." (Italics supplied.)

The House Report explaining the 1943 amendment, [11] uses the phrase "military pay" as synonymous with the compensation subject to the exemption (H. Rep. No. 401, 78th Cong., 1st Sess., p. 21 (1943 Cum. Bull. 1283, 1288)), and moreover makes it clear that the statute applied "only to salary or compensation received for active service * * *." H. Rep. No. 401, 78th Cong., 1st Sess., p. 41 (1943 Cum. Bull. 1283, 1313). See also S. Rep. No. 221, 78th Cong., 1st Sess., pp. 13-14, 47-48 (1943 Cum. Bull. 1314, 1324, 1349).

The Senate Hearings on the Current Tax Payment Act of 1943 leave no question that it was generally understood that the exclusion related only to "military" or "service" pay. The comprehensive statement of Randolph Paul, General Counsel of the Treasury Department, used the statutory language and the phrase "service pay" interchange-

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[10] Section 117, Revenue Act of 1942.

[11] Section 7 (a), Current Tax Payment Act of 1943.

ably, and later in the hearing when the Chairman of the Committee paraphrased the House bill provision as relating to income "from the Government," Mr. Paul corrected by saying, "Service pay." The chairman agreed with Mr. Paul, saying, "Yes; whether he is married or single," whereupon Mr. Surrey, the legislative counsel of the Treasury, stated, "That is correct." Senate Hearings before the Committee on Finance, 78th Cong., 1st Sess., on Current Tax Payment Act of 1943, pp. 7, 41.

The Congressional understanding, with respect to the 1942 and 1943 amendments, that the phrase in Section 22 (b) (13), "Compensation received * * * for active service * * * in the military or naval forces * * *", means "service" or "military" pay is equally clear as to the 1945 amendment. S. Rep. No. 655, 79th Cong., 1st Sess., pp. 34-35 (1945 Cum. Bull. 621, 648); H. Conference Rep. No. 1165, 79th Cong., 1st Sess., p. 8 (1945 Cum. Bull. 654, 656).

This precise and repeated reference by the legislators to the enactment as one excluding only military pay precludes any contention that taxpayer was of the class intended to be benefited. As we point out more fully in part C, *infra*, pp. 30-37; 39-40, there can be no question that he received no military or service pay, and that his compensation stemmed solely from his civilian position with the Coast Guard. He served with civilian pay only. It follows from the clear Congressional understanding

of the coverage of the exclusion that he is not entitled to the exemption.

In addition to making it perfectly plain that taxpayer's pay was not the type intended by Congress to be covered, the legislative materials also indicate the reason for the Congressional purpose of limiting the exclusion to service pay.

During the debate on the Current Tax Payment Act of 1943, Congressman Van Zandt,[12] speaking in opposition to an amendment which would have limited the exemption to members of the armed forces serving outside the United States, explained the purpose of the provision that was adopted as follows (89 Cong. Rec. 2742, 2754-2755):

> It is realized that *these exemptions* [the existing exemptions of $250 for single persons and $300 for married persons in the armed forces] *are not sufficient to assist a member of the military forces to enable him to meet the problem of taxation arising from his transition from a civilian to a military status.*
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> * * * * *
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> The proposed $3,500 exemption * * * is limited to income derived entirely from his service as a member of the military or naval

[12] Although he was not a member of the Ways and Means Committee, the Congressman's views are entitled to more than ordinary weight by virtue of his membership on the Committees of Merchant Marine and Fisheries and World War Veterans' Legislation. Congressional Directory, 78th Cong., 1st Sess., p. 228. The relevance of the jurisdiction of the latter Committee to this question is self-evident; the importance of the former is that it had jurisdiction over legislation relating to the Coast Guard and the Coast Guard Auxiliary and Reserve Act originated there.

> forces. If the serviceman has an *income in addition to his military or naval pay it is subject to income tax* on the same basis as if he were a civilian. (Italics supplied.)

The defeat of the proposed amendment and the debate concerning it indicate that the purpose of the exclusion was not to grant a gratuity for hazardous duty as would have been the case had the amendment been approved, or even a gratuity for military service, as such, but to recognize the financial hardship generally inherent in being cut off from civilian income. Most persons who entered the armed services made some financial sacrifice, and the exemption was designed to afford a measure of relief against the general disparity in the levels of civilian and military compensation.

The facts of taxpayer's temporary service in the Coast Guard clearly show that neither the Congressional purpose to exclude "military" pay nor its reason for the exclusion—the presumption that a financial hardship was involved in most cases in the substitution of military pay for civilian pay—is served by granting the exclusion to the taxpayer. It is undisputed that his pay was civilian, not military (R. 33-35) and continued to be the same amount that he received as a civilian even down to the last penny. Moreover, he was not subject to the additional financial hardships which were almost the inevitable concomitant of military duty caused by transfer away from home and inability to pursue more gainful pursuits at will, since in-

like all other officers he could not be transferred and it may be that he could resign merely because he had better financial opportunities elsewhere.[13]

In short, as far as financial considerations are concerned, taxpayer's status was not only like that of a civilian, it was in fact civilian. Since the exclusion related by its terms and purpose only to pay which was military in source and amount, it follows that taxpayer should be denied the exclusion.

C. *Taxpayer received no compensation "for active service as a commissioned officer"; his compensation came solely from his civilian position with the Coast Guard which he continued to hold.*

We have pointed out in part B of the Argument, *supra*, the considerations which support our belief that the case for denial of the exemption parallels that of, and is as strong as, *Mitchell* v. *Cohen*, 333 U. S. 411. Actually, however, as we stated at the outset, the Commissioner's position here is correct even if there were doubt as to the correctness of *Cohen*. There, as we have previously noted, the right to veterans' preference depended on whether the claimant was an ex-serviceman. The Court acknowledged that Cohen came within the literal

[13] One of the reasons for which temporary Coast Guard officers could resign, as was noted in part A, *supra*, was "own convenience," and "Change in Business Conditions" was one of the conditions of "own convenience" expressly recognized by the Coast Guard. Personnel Bulletin 75-45, Appendix B, *infra*, p. 62.

meaning of that term in at least one of its senses ["Ex-servicemen are indeed those who have performed military service" (333 U. S. 411, 418)], but held that, despite "dictionary definitions," the statutory scheme precluded Cohen from preference. Similarly, we have shown that the scheme of the exemption provision also requires a denial of its benefit to the taxpayer. Unlike the Veterans' Preferance Act, however, the plain language of the Internal Revenue Code establishes that taxpayer has no proper claim to its exclusion benefits.

1. The critical language of Section 22 (b) (13) (A) ["compensation received * * * for active service as a commissioned officer * * *,"] we think plainly means the amount paid to the taxpayer for service as an officer.[14] The preposition "as," according to its definition, means: "In a manner like that of: * * * In the idea, character, condition, or capacity of; limiting the consideration to certain attributes or relations; as, virtue considered as virtue; to appear as Hamlet * * *." Webster's New International Dictionary (1948). Thus, the literal meaning of the statute would be that one claiming the exclusion must receive military pay, and this, we noted in part B, *supra*, was the phrase repeatedly used in the Committee reports as synonymous with the statutory provision. Taxpayer received nothing for active duty "in a

[14] We here assume favorably to the taxpayer that he was a commissioned officer, although the Tax Court (R. 37-39) and Judge Edgerton (R. 59) both thought that he was not.

manner like that of", "or capacity of" a commissioned officer. On the contrary, he served without military pay and allowances, receiving only his salary as a civil service employee. (R. 33-36.) His certificate of enrollment expressly stated that he was to have no military pay or allowances other than the compensation of his civilian position (R. 16, 20, 34). His certificate of disenrollment as a Commander described his pay status first as "Coast Guard Civil Service Employee, without military pay" (R. 35), and upon his objection to the form of that disenrollment, the second described the circumstances of his pay as "having civil service status, receiving civilian but no military pay, and holding rank of Commander as a Temporary Member of the Coast Guard Reserve." (R. 36.) And the Coast Guard Auxiliary and Reserve Act of 1941, as amended (Appendix A, *infra*, pp. 41, 42), under which taxpayer was enrolled, expressly confirms the fact that he served with civilian pay only. See *infra*, pp. 30 *et seq.*

2. Assuming the critical point, the Court of Appeals held that the compensation taxpayer received was necessarily received "for active service as a commissioned officer." The court's reasoning was this (R. 58):

> To reach the conclusion that petitioner's compensation was not for service in the naval forces, we would have to hold that he worked full time for no compensation while, at the

same time, he received full compensation for no work.

This conclusion is fallacious because it assumes —contrary to the record, contrary to the Coast Guard Auxiliary and Reserve Act, and contrary to its history and administrative interpretation— that taxpayer did not continue to occupy and perform the duties of his civil service position for which he continued to be paid his civilian salary, while at the same time exercising military rank and authority for which he was paid nothing.[15]

Section 207 of the Coast Guard Auxiliary and Reserve Act expressly provides for the enrolling of "persons (including Government employees without pay other than the compensation of their civilian positions)" who, because of their special training and experience, are deemed qualified for duty. The parenthetical phrase added to Section 207 by the Act of November 23, 1942, c. 639, 56 Stat. 1020, Section 2, was explained by the House Report of the Committee on the Merchant Marine and Fisheries (H. Rep. No. 2525, 77th Cong., 2d Sess., p. 3) as being "advisable to

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[15] In addition to the different sources and purposes of civil service and military compensation, there are other important differences, including the following: The amount paid a Lieutenant Commander is different from that paid a P-5; even under the Court of Appeals' decision, there are different tax consequences (R. 54-55); military pay increases with longevity in a manner entirely different from classified civil service pay; the latter is subject to overtime compensation, whereas military pay is not; and civil service pay is reduced by retirement deductions but military pay is not.

clarify this authority [enrollment of temporary members with or without pay] and resolve any doubt of its applicability to Government employees by specifically providing for temporary membership in the Coast Guard Reserve of Government employees without military pay *but with continuance in their civilian positions and the receipt of the compensation thereof.*" (Italics supplied.) The Report further stated (p. 3) that it was believed that under present authority Government employees could be enrolled as temporary members without pay "on a same basis as persons of other civilian status. * * *." This authority, the Report said (pp. 2-3), emanated from the Act of June 6, 1942, c. 385, 56 Stat. 329, Section 1 (4), which had amended Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, to authorize the enrollment of qualified men as temporary members of the Reserve for full-time, intermittent or part-time duty without pay. "Under this authority men in all walks of life have been enrolled in the Coast Guard Reserve and perform special duty with military authority and responsibility *in addition to carrying on their regular vocations.*" (Italics supplied.) An example given by the Report was that of the enrollment of licensed officers in the Merchant Marine in the Great Lakes area for vessel and port security purposes. These men, the Report stated, serve without pay, as have fishermen and others for antisubmarine patrol, guards at shipyards

and war industry plants, and men of various professions and skills for beach patrol and duty at Coast Guard shore establishments. "*These temporary members* of the Reserve *continue in the pay of their employers.*" (Italics supplied.) (p. 3).

The Report gave as the reason for clarifying the authority of the Commandant to enroll government employees as temporary members of the Coast Guard, the elimination of "one of the most difficult problems now confronting the Coast Guard," and the "proper and equitable solution of the problem concerning the place in the service organizational scheme of civilians who are performing practically the same duties as military personnel * * *." (p. 3.) The Report continued (p. 3) that an example of the administrative problem posed by this situation was the status of Merchant Marine inspectors "who are under the supervision of Coast Guard officers and in turn have military personnel under their direction," and who perform duties in connection with the Merchant Marine which, during time of war, are of military character. The Report pointed out (p. 3) that it would not be practical to commission all such members in the regular Reserve for various reasons "not the least of which is that it would be not only difficult to adjust their ranks or ratings and service pay with their civilian positions and compensation, but it would be impossible for many of them to meet the physical

and age requirements for induction into the regular Reserve." The Report concluded (p. 3):

> This amendment is proposed and recommended by your committee since it would solve this administrative problem by resolving any possible doubt of the authority of the Coast Guard to enroll certain Government employees as temporary members of the Reserve for active Coast Guard duty without the pay of their military rank or rating, and would obviate any possible impairment of the right of such employees to continue to receive the compensation of their civilian positions for the entire period of their performance of active Coast Guard duty as such temporary members. *There will be little, if any, change in the nature of their duties after enrollment.* [Italics supplied.]

In view of this clear explanation of legislative purpose, it seems plain that the Court of Appeals' conclusion that the compensation which the taxpayer received was for his services as a commissioned officer is a confusion of thought born of the coincidence that taxpayer's civilian employer happened to be the United States Government. The overwhelming majority of the persons enrolled as temporary members of the Coast Guard Reserve were, at the time of their enrollment and throughout their service in the Coast Guard, employees of private employers who continued to perform their civilian duties. Thus, all of those persons enrolled under classifications 3, 4, and 5, of temporary members (set out *supra*, p. 12)

had private employers and were paid by them during the entire tenure of their full-time Coast Guard service. As the Committee Report explains by way of example, it was desirable to enroll Merchant Marine officers in the Great Lakes area as temporary members of the Coast Guard for vessel and port security purposes. Plant guards who were the employees of private war-material manufacturers, and pilots whose duty was to guide ships of the Merchant Marine and even of the Navy and Coast Guard into ports, were obviously also enrolled for security reasons. The duties of these plant guards, pilots, and Merchant Marine officers continued to be the same after enrollment as before, and this was also true in the case of the taxpayer and all other enrolled civil service employees of the Coast Guard. The sole purpose of the enrollment of Coast Guard civil service employees was to give them military rank and authority to remove administrative difficulties. This could be and was accomplished by continuing them in their civilian positions with military rank and authority.

There is nothing in the statute, in the Committee Reports, or in the record of the taxpayer's military service to indicate that he did not continue to be at the same time a civil service employee of the Coast Guard. Indeed, the record shows that during his tenure as a Lieutenant Commander in the Coast Guard, he was promoted in his civil service position from a P-5 to a P-6.

(R. 33.) It was only after the civilian promotion that the military authorities decided to give the taxpayer a military promotion, which, as the record states, was done in accordance with the Commandant's Memorandum of March 10, 1944. (R. 33.) That memorandum (Appendix B, *infra*, pp. 57-58), which is the Commandant's administrative interpretation of the Act,[16] clearly recognized that those in taxpayer's classification continued to be civil service employees of the Coast Guard who had also been given military status. The memorandum set forth the policy of giving military promotions to those temporary members who received an increase in grade and pay in their civilian positions. The military promotion was to be recommended if it was felt that it was necessary "to enable the *employee* to perform his duties better." (Italics supplied.) The memorandum made it clear that no military rank would be given which carried higher pay than the employee's civil service pay nor was the temporary member "*who is also a civilian employee*" (italics supplied) to have higher rank than an organizational superior. This administrative explanation, fully authorized by the statute, is a clear recognition of the con-

[16] It is worthy of note that Section 207 of the Coast Guard Auxiliary and Reserve Act gave broad authority to the Commandant "to enroll as temporary members of the Reserve, for duty *under such conditions as he may prescribe* * * * *to define their powers and duties*, and to confer upon them, appropriate to their qualifications and experience, the same ranks, * * * as are provided for the personnel of the regular Coast Guard Reserve." (Italics supplied.)

tinuance of taxpayer's civilian status."[17] He is referred to throughout the memorandum as "also a civilian employee," a designation totally at variance with the Court of Appeals' assumption that he was no longer a civilian but only a member of the military whose rate of pay happened to be measured by his former civilian position.

It could not seriously be contended that those temporary members of the Coast Guard in classifications 3, 4 and 5, (*supra*, p. 12) who continued to perform their civilian duties and were paid by private employers were receiving their civilian compensation "for active service as a commissioned officer." Yet their status parallels in every respect those in taxpayer's classification, and we think it worthy of repetition that it is only the coincidence that the taxpayer's civilian and military employer was the same person, the United States, that the Court of Appeals' views have even a superficial validity. In fact, it is as illogical to contend that taxpayer's civilian pay compensated him for his extra military responsibility as it would be to contend that those in the Volunteer Port Security

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[17] Both the taxpayer's first disenrollment as a Temporary Commander in the Coast Guard to which he objected, and the second one, as well, referred to him as a civil service employee during the time of his enrollment as a temporary member of the Coast Guard. The first disenrollment described his service as "Coast Guard Civil Service Employee, without military pay," and the second one described his duty as "Chief of Admiralty and Maritime Section having civil service status, receiving civilian but no military pay, and holding the rank of Commander as a Temporary Member of the Coast Guard Reserve." (R. 35-36.)

Force, such as Cohen, who performed part-time military duties not related to their civilian work, were also being compensated for their additional military duties by a portion of their civilian pay.

3. The Court of Appeals' emphasis (R. 55) on the contents of the Commandant's office Memorandum No. 13-43 (R. 29-31) does not support its views. The Court of Appeals quotes paragraphs two and six. Paragraph two of the memorandum states that a temporary member of the Reserve has the "same power, authority, rights and privileges as members of the regular Coast Guard of similar rank * * * in the execution of the duty assigned to him." (R. 56). That statement is, of course, consistent with the legislative purpose, related above, to resolve the administrative problem posed by lack of military authority in those holding civilian positions of importance, and is consistent with our position that taxpayer continued to perform civilian duties for which alone he was compensated. It does not suggest, as the Court of Appeals implied, that there were no real distinctions between a temporary and regular member of the Coast Guard Reserve. If any ambiguity existed as a result of paragraph two, it was negatived by paragraph three which the Court of Appeals did not quote. That paragraph stated (R. 30):

> 3. The Commandant desires to make it crystal clear that there is a definite distinction between the military status and activities of a temporary member of the Reserve and the de-

> termination of the benefits—particularly with regard to pecuniary benefits—that derive to such temporary members in the Coast Guard Reserve. This question of benefits, particularly financial benefits, of temporary members of the Reserve is not involved in this memorandum whatsoever, and nothing in this memorandum shall be so construed.

Paragraph six, quoted by the Court of Appeals, confirms the Congressional purpose, already noted, of enrolling civil service employees as temporary members of the Reserve, to obtain a homogeneous organization on a military basis and to eliminate differences in procedure and practices applicable to military personnel and civil service personnel engaged in exactly the same duty. Moreover, paragraph seven concluded the Commandant's memorandum by stating: "It is desired to reiterate that nothing contained in this memorandum has any bearing on the benefits accruing to a temporary member of the Reserve by reason of the military status acquired * * *." (R. 31).[18]

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[18] It should be noted that it was repeatedly made clear to the taxpayer that he had only limited military benefits. Thus, his certificate of enrollment as commander, after stating the nature of his injury and sick benefits, stated that he had "only * * * (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations." (R. 20-21.) This and the other official notices of his limited benefits already referred to should be contrasted with taxpayer's testimony (R. 24):

> Q. Immediately after enrollment, what was your understanding as to the nature of your status because of the enrollment? A. Because of the representations that had

4. Our view that the taxpayer continued to hold civil service employment, for which he was paid, while at the same time holding military rank and authority, is confirmed by the incidents of his Government service during this period. We have already referred to the fact that he received a civilian promotion while exercising military authority. *Supra*, pp. 3, 34-35). He also continued to receive the same annual and sick leave that was given civil service employees, and he collected overtime pay for work in excess of forty hours per week. *Supra*, pp. 15-16, 29). In addition, the other conditions of taxpayer's military service (*supra*, pp. 13-16) have a significant bearing, especially his apparent right to resign "for his own convenience"—a right which he would have as a civil servant but normally not as a regular member of the military—and the lack of authority in his superiors to transfer him away from his home without his permission. All of these considerations, contrasted with the various restrictions imposed upon and the benefits afforded to full-fledged members of the armed forces, overwhelmingly show the taxpayer's true situation as that of a civil service employee who for the administrative

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been made, in writing or orally, I saw no reason for drawing a conclusion that there was any difference between my status as an officer in the Coast Guard Reserve and any other person who had graduated from the Coast Guard Academy or who had been brought into the Coast Guard Reserve during the war emergency. In other words, I thought that I was an officer of the Coast Guard Reserve without qualifications—without any restrictions or limitations.

convenience of the Government had military rank and authority. There can then be no question that his civil service pay was not for active duty as a commissioned officer.

5. Finally, if there were any doubt remaining that taxpayer did not receive compensation "as a commissioned officer," indeed if the contentions on each side were nicely balanced, the decision should be against the exemption, for the doctrine is firmly entrenched, as stated in *Trotter* v. *Tennessee*, 290 U. S. 354, 356, and reaffirmed in *United States* v. *Stewart*, 311 U. S. 60, 71, that "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced." See also *Pacific Co.* v. *Johnson*, 285 U. S. 480, 491; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 136; *U. S. Trust Co.* v. *Helvering*, 307 U. S. 57, 60.

## CONCLUSION

The decision of the Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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SEPTEMBER 1949

APPENDIX A

1. Coast Guard Auxiliary and Reserve Act of 1941, c. 8, 55 Stat. 9:

> Sec. 206 [as amended by the Act of July 11, 1941, c. 290, 55 Stat. 584, Section 10; by the Act of June 6, 1942, c. 385, 56 Stat. 329, Section 1 (3); and by the Act of November 23, 1942, c. 639, 56 Stat. 1020, Section 2 (4)]. Commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Reserve when engaged on active duty, on active duty while undergoing training, on training duty with pay, or when engaged in authorized travel to or from such duty, shall receive the same pay and allowances as are received by commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Naval Reserve of the same rank, grade, rating, and length of service; pay and allowances of cadets of the Reserve shall under the same conditions, for the same purposes, and in the same manner, be assimilated to the pay and allowance of midshipmen of the Naval Reserve. * * *
>
> (14 U. S. C. 306.)
>
> Sec. 207 [as amended by the Act of June 6, 1942, *supra*, Section 1 (4); the Act of October 26, 1942, c. 628, 56 Stat. 990, and the Act of November 23, 1942, *supra*, Section 2]. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve,

for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motor-boat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States, or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve. (14 U. S. C. 307.)

Sec. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, and no member of the Reserve, other than temporary members thereof, shall be a member of any other naval or military or-

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ganization except the Auxiliary or the Coast Guard as provided for in sections 214 and 215 of this title: *Provided*, That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated.

(14 U. S. C. 308.)

Sec. 209. All members of the Reserve when employed on active duty, or when employed in authorized travel to or from such duty, or while wearing a uniform prescribed for the Reserve, shall be subject to the laws, regulations, and orders for the government of the Coast Guard: *Provided*, That disciplinary action for an offense committed while subject to the laws, regulations, and orders for the government of the Coast Guard shall not be barred by reason of release from duty status of any person charged with the commission thereof: *Provided further*, That for the purpose of carrying the provisions of this section into effect, members of the Reserve may be retained on or returned to a duty status without their consent, but not for a longer period of time than may be required for disciplinary action.

(14 U. S. C. 309.)

* * * * *

Sec. 212 [as amended by the Act of November 23, 1942, *supra*]. When any temporary

member of the Reserve is physically injured in line of duty while performing active Coast Guard service, or dies as a result of such physical injury, such member or such member's beneficiary shall be entitled to all the benefits prescribed by law for civil employees of the United States, and the United States Employees' Compensation Commission shall have jurisdiction in such cases and shall perform the same duties with reference thereto as in the case of civil employees of the United States. Temporary members of the Reserve who contract sickness or disease while performing active duty shall be entitled to the same hospital treatment as is afforded members of the regular Coast Guard.

(14 U. S. C. 312.)

2. Internal Revenue Code:

SEC. 22. GROSS INCOME:

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(13) [As added by Section 117 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as amended by Section 7 (a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and as further amended by Section 141 (a) of the Revenue Act of 1945, c. 453, 59

Stat. 556]. *Additional allowance for military and naval personnel.*—

(A) In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war, or, in the case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, so much of such compensation as does not exceed $1,500.

(B) Compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a member below the grade of commissioned officer (or commissioned warrant officer) in the military or naval forces of the United States during such war.

(26 U.S.C. 22.)

3 Revenue Act of 1945, c. 453, 59 Stat. 556:

SEC. 141. ADDITIONAL ALLOWANCE FOR MILITARY AND NAVAL PERSONNEL.

* * * * *

(b) *Taxable Years to Which Applicable.*—Subparagraph (A) of section 22(b)(13), as amended by subsection (a) of this section, shall be applicable with respect to taxable years be-

ginning after December 31, 1942; subparagraph (B) thereof shall be applicable with respect to taxable years beginning after December 31, 1940.

* * * * *

4. Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(b)(13)-1 [as amended by T.D. 5508, 1946-1 Cum. Bull. 27]. *Compensation of Members of Military and Naval Forces.*—

* * * * *

(b) * * *

The exclusions under section 22 (b) (13) and this section are applicable only to compensation received prior to the termination of the present war to be fixed by proclamation of the President. * * * For the purposes of this section the military and naval forces of the United States include (but are not necessarily limited to) the Army, the Navy, the Marine Corps, the Coast Guard, the Army Nurse Corps, Female, the Navy Nurse Corps, Female, the Women's Army Auxiliary Corps or the Women's Army Corps, the Women's Reserve branch of the Naval Reserve, the Marine Corps Women's Reserve, and the Coast Guard Reserve, including the Coast Guard Women's Reserve.

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APPENDIX B

UNITED STATES COAST GUARD

Washington 25, D. C.

22 January 1946

COMMANDANT'S CIRCULAR NO. 5-46

Subj: Benefits and Privileges Accorded Temporary Members of the Reserve

1. This statement is intended to review the status of temporary members of the Reserve in terms of the benefits and privileges accorded them. This will serve as the official basis for the Coast Guard's disposal of questions which may arise in connection with temporary membership in the Reserve.

*Purpose for which this Class of Reserve was Established*

2. Public Law 8-77th Congress, approved 19 February, 1941, which authorized the establishment of this class of personnel provided:

> SEC. 207. The Commandant, with the approval of the Secretary of the Treasury, is hereby authorized to enroll for active duty, as temporary members of the Reserve, such owners, regular officers, and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard as are citizens of the United States or of its Territories or possessions, except the Philippine Islands, define their powers and duties, and confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regu-

lar Coast Guard Reserve. . . . Provided, that temporary membership in the Reserve and the other benefits conferred by this section as a result thereof shall extend only for such period as the motorboat or yacht to which such members are attached is utilized in the service of the Coast Guard.

Public Law 599—77th Congess, approved 6 June, 1942, extended eligibility for enrollment to all members of the Auxiliary—whether or not boat owners—and to " . . . such men who by reason of their special training and experience are deemed by the commandant to be qualified . . . "

3. Amendment No. 4 to the Coast Guard Reserve Regulations dated 23 June, 1942, stated: "The primary purpose of creating this class of reservist is to enable the Coast Guard to utilize on special assignments of a wide variety the part-time services of especially well qualified men." Essentially, therefore, the intent of the legislation creating temporary membership in the Reserve was to provide a subsidiary pool of trained boatmen and their craft which would be available to supplement the regular Reserve in sudden emergencies of a local nature. The original purpose was later broadened so as to include the utilization of other specialists who might be unable to accept membership in the regular Coast Guard Reserve but whose temporary assistance on a part-time basis might be invaluable in their local areas. [See Senate Report No. 1317 of 7 May, 1942.]

4. Specifically, the types of duty for which temporary members of the Reserve were enrolled fall into the following general classifications:

a. For part-time or intermittent duty without military pay and allowances other than for uniforms. [Duty in this classification was usually for a period of twelve hours per week.]

b. As pilots without military pay and allowances other than for uniforms.

c. As officers of Great Lakes vessels without military pay and allowances other than for uniforms.

d. As Coast Guard police without military pay and allowances.

e. As Civil Service employees of the Coast Guard without pay other than compensation of their civilian positions.

In addition to these classifications for a brief period, a limited number of temporary members of the Reserve were enrolled with military pay and allowances for active full-time duty at shore stations or on Coast Guard vessels. For the most part those enrolled under this category were utilized on anti-submarine patrol during the early stages of the war. It was soon recognized that this type of service overlapped that of the regular Reserve, and this classification was eliminated as soon as possible largely by transfer of the members to the regular Reserve.

*Distinguishing Characteristics of Temporary Membership in the Reserve*

5. Service of temporary members of the Reserve, since the creation of this class, has been distinguished from that of the regular Reserve by limitations upon the duty or the place in which the duty may be performed. The original act provided: ". . . That temporary membership in the Reserve and the other benefits conferred by this section as a result thereof shall extend only for such period as the motorboat or yacht to which such members are attached is utilized in the service of the Coast Guard." Regulations for the U. S. Coast Guard Reserve issued in April 1941, pursuant to Public Law 8—77th Congress, provided in article 4301:

> Temporary reservists are appointed on the basis of their relationship to a privately owned vessel placed at the disposal of the Coast Guard by the owner thereof, and their temporary status is dependent upon their connection with such a vessel. Accordingly, such personnel shall not be transferred even temporarily from the vessel which forms the basis of their temporary appointment or enlistment.

When temporary membership in the Reserve was broadened by Public Law 599—77th Congress, this article was replaced by Article 2208 [later renumbered article 2207] which provides as follows:

> Notwithstanding any other provision of these Regulations, temporary reservists who are enrolled for special assignment duty on a part-time or intermittent active duty basis will

> not be subject to transfer without their consent from the vessel or place of their performance of active duty, and their orders shall so state.

The following provision was inserted as part of article 2207 also at this time:

> . . . The powers and duties of these reservists [temporary reservists] and the *tenure, conditions* and *place* of their active duty will be set forth in their orders . . . [italics supplied].

6. In recognition of the limitations on the service to which temporary members of the Reserve were liable, the basic legislation provided that temporary members of the Reserve should not be exempt by reason of such enrollment from registration and liability for training and service under the Selective Service and Training Act. Sec. 208 of Public Law 8—77th Congress, provided in article

> . . . That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall forthwith be released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated.

*Benefits and Privileges Accorded Temporary Members of the Reserve*

7. Regular reservists on active duty occupy the same military status as members of the permanent Coast Guard establishment. They are, therefore, subject to any type of duty in any geographical area and are constantly subject to regular military

discipline. Consequently, they have privileges similar to those accorded by law to members of the regular service. The service of temporary members of the Reserve, however, is restricted as to type, locality, time, and extent of military discipline. It is, therefore, appropriate that their privileges should be limited accordingly.

8. Regular reservists who suffer disability or death in line of duty are by law entitled to the same benefits as regular members of the Coast Guard, whereas the Coast Guard Reserve Act specifies that when any temporary member of the Reserve is physically injured in line of duty or dies as a result of such physical injury, he or his beneficiary shall be entitled to the benefits prescribed by law for civil employees of the U. S. Temporary members of the Reserve who are physically injured or contract sickness or disease while performing active duty shall be entitled to the same hospital treatment afforded regular members of the Coast Guard. Although the law relating to life insurance is not specific in its application to temporary members of the Reserve, the Administrator of Veteran's Affairs has held that the benefits of that act are not available to them. The administrator in issuing the ruling stated, in part:

> "Service in the land and naval forces as referred to in the National Service Life Insurance Act means continuous service in such forces by persons ordered to active duty for a period of not less than thirty days, and fairly construed would appear to exclude the members of any group whose status is or may be intermittently that of a civilian."

9. Temporary members of the Reserve enrolled under any of the classifications except that involving full-time duty with military pay were able to perform their duties while continuing with their regular civilian occupations and hence without impairment of their employment status. The Secretary of the Navy recognized the special character of the service rendered by those enrolled for such full-time duty, which was performed under arduous and frequently hazardous conditions. He, therefore, has ruled that they should be considered as naval veterans. In the light of this ruling the Civil Service Commission has ruled that the performance of ". . . active full-time duty with pay and allowances . . ." shall be the basis for granting veteran preferences. [Departmental Circular No. 508 dated November 4, 1944] Similarly eligibility to receive mustering out payments has been determined on this same basis, i.e., only those temporary members of the Reserve performing full-time active duty with naval pay and allowances are declared eligible. [Navy Department Mustering-Out Payments Regulations, Approved 6 January, 1945.]

10. These specific rulings are, in the opinion of the Coast Guard, entirely fair and reasonable with respect to the interests of the full-time members of the several military forces, and of the various classes of temporary members of the Reserve themselves. The Coast Guard is fully aware that many temporary members of the Reserve have performed important, valuable, and sometimes hazardous duties. With the exception of the special group described above, however, the temporary members of the Reserve have served part-time while living

at home and continuing their ordinary occupations, have not been subject to military control except when actually on duty and have been able to resign from the service at any time upon request. To make all classes of temporary members of the Reserve eligible for the various benefits established for veterans would therefore be clearly inconsistent with the intent and purposes of such benefits. These benefits, for the most part, have been designed to ease the readjustment of the veteran-to-civilian life and to assist him in regaining the economic position which he has lost because of his military service.

11. The Coast Guard has recognized the distinction outlined above in the establishment of eligibility for the honorable service lapel button. The public has gradually come to recognize this button as reflecting those sacrifices incidental to full-time active service in this war. Therefore, it has been ruled that only those temporary members of the Reserve who have served full time with military pay are eligible for this button. [Personnel Bulletin No. 128-43]

*Miscellaneous Questions Raised by Temporary Members of the Reserve:*

12. A number of other specific questions regarding the status of temporary members of the Reserve have been raised from time to time. With respect to some of these questions, the Coast Guard is not the determining agency.

*Certificate of Disenrollment vs. Honorable Discharge:*

The Coast Guard has adopted the policy of issuing Disenrollment Certificates rather than

Honorable Discharge Certificates to temporary members of the Reserve in order to clearly differentiate the types of service rendered by the holders of each certificate. Even more so than the honorable service lapel button, the discharge certificate has a clearly defined meaning not only to personnel within the services but to the public as well. Such a certificate represents the completion of a term of full time active service. The character of the discharge constitutes a certification of a specific standard of conduct and proficiency attained while subject to the military discipline which full time service in the military forces entails.

Further, the general public immediately identifies as a veteran the holder of a certificate of discharge from war service. Since it is not the policy of the Coast Guard or the Navy Department to consider as veterans temporary members of the Reserve other than those enrolled for full time duty with military pay, a distinctive type of separation certificate has been adopted. The teminology used in the Reserve Act itself has been followed in the selection of the term "disenrollment." That Act authorized the Commandant to "enroll" temporary members of the Reserve. The legal significance of either certificate is the same—honorable separation from the Reserve.

*Coast Guard Honorable Discharge Button:*

The Coast Guard Honorable Discharge button is not issued to temporary members of the Reserve inasmuch as this button is issued only to holders of Honorable Discharge Certificates [Form 2510].

*Credit of Service of Temporary Members of the Reserve for Longevity Purposes:*

In accordance with the Comptroller General's decision (B-33903), 4 September, 1943, only periods during which duty is performed can be counted for longevity pay purposes. Non-duty status of temporary members of Reserve is not deemed the equivalent of inactive service status of regular Coast Guard reservists. Therefore, periods when no duty was assigned or performed may not be counted [Finance and Supply Circular 217-43.]

*Income Tax Deductions:*

The Commissioner of Internal Revenue on 23 February, 1944, held that temporary members of the Coast Guard Reserve not paid by the Coast Guard for their military service are not entitled to the $1500 exclusion allowed members of the armed forces for Federal income-tax purposes. The exclusion from gross income does apply to military pay received by temporary members of the Reserve. [Finance and Supply Circulars 264-43 and 34-44]

*Membership in American Legion, Sojourners, Etc.*

Certain private veterans' organizations have ruled temporary members of the Reserve ineligible for membership in their organizations. Such matters are entirely for the decision of such organizations and the Coast Guard does not wish to influence such decisions in any way. When called upon to do so the Coast Guard will supply all pertinent facts regarding the status of temporary membership of the Reserve and the policy of the Coast Guard as outlined in this statement.

*Credit toward Discharge Points*

Active duty as a temporary member of the Coast Guard Reserve on a full-time with military pay basis is included in computing total service for which credit is given to determine discharge points. [Alcoast 63-45]

*Campaign and Service Ribbons*

Temporary members of the Reserve have been declared eligible for the World War II Victory Medal and for the American Campaign Medal provided that in the case of the latter they have 365 days of service. [Alcoast 148-45]

(S.) J. F. FARLEY,
*Admiral, U. S. Coast Guard.*

CG Dist List
A,B,C,D,E

UNITED STATES COAST GUARD
Washington, D. C.

Address Reply to
THE COMMANDANT (PCP)
Refer to File: CG-023
10 March, 1944

MEMORANDUM FOR CHIEFS OF OFFICES AND DIVISIONS AT HQ

Subj: Promotion of members of the Temporary Reserve at Hq who are also civilian employees

1. A number of the technical, professional, and subprofessional employees at Headquarters have been enrolled as Temporary Members of the Coast Guard Reserve in order to give them military

status. The rank or rating of these employees was assigned on the basis of the job to be performed. In order that there may be uniformity and a correlation between the ranks of the Temporary Members of the Reserve and the officers in Class (S) and (G) of the Reserve, the following policy will govern promotion:

(a) If an employee who is also a member of the Temporary Reserve is given an increase in grade and salary in his civilian position, the Division Chief may recommend a promotion in his military rank or rating if it is felt that this promotion is necessary in order to enable the employee to perform his duties better.

(b) In no case, however, should the Division Chief recommend a rank or rating which would carry with it a higher rate of pay in class (S) and (G) of the Reserve than the employee's Civil Service pay, nor should the Division Chief recommend a rank or rating which would give the member of the Temporary Reserve who is also a civilian employee, a higher rank or rating than any organizational superior who is in the Regular Coast Guard or Class (S) or (G) of the Reserve.

R. R. WAESCHE,
*Commandant.*

UNITED STATES COAST GUARD
Washington 25, D. C.

20 April 1948

PERSONNEL CIRCULAR No. 16-48

Subj: Honorable Service Lapel Button, issuance of; Honorable Discharge Emblem, discontinuance of

Refs: (a) Personnel Bulletin 128-43 (Corrected)
(b) Personnel Bulletin 9-45
(c) Personnel Circular 14-47

1. Reference (a) outlined the procedure for the issuance of the Honorable Service Lapel Button for officers and enlisted personnel separated from active service under honorable conditions and is hereby cancelled.

2. The Honorable Service Lapel Button heretofore has been issued coincident with the discharge or separation from active duty and for this reason a mistaken impression now exists that the lapel button is a discharge emblem denoting separation from the Service. Actually, the lapel button is emblematic of honorable service during World War II. In recognition of this fact, the Honorable Service Lapel Button shall be worn in lieu of a lapel button for the World War II Victory Medal and/or the American Defense Service Medal subject to the condition set forth in par. 3, hereof.

3. Except as applied to all Temporary Members of the Coast Guard Reserve who are ineligible by the provisions of the Armed Forces Personnel Board Statement of Policy dated 30 January 1948, the following eligibility requirements relative to

the Honorable Service Lapel Button and the issuance thereof are established:

(a) Personnel who honorably served on active duty for any continuous period between 9 September 1939, and 31 December 1946, both dates inclusive, are entitled to receive the Honorable Service Lapel Button.

(b) Personnel now serving on active duty who have been issued the World War II Victory Medal and/or the American Defense Service Medal according to reference (c) are automatically eligible to receive the Honorable Service Lapel Button and it shall be so issued to these personnel.

(c) Personnel now serving on active duty who have not been issued the World War II Victory Medal and/or the American Defense Service Medal but who are eligible to receive either or both of these medals in accordance with reference (c) are also entitled to receive the Honorable Service Lapel Button which shall be issued coincident with the World War II Victory Medal and/or the American Defense Service Medal in accordance with the provisions of this Circular.

(d) Since 31 December 1946, (the date the President proclaimed the termination of hostilities) is herein established as the cut-off date with respect to eligibility for the Honorable Service Lapel Button, personnel who initially entered on full time active duty with military pay and allowances on or after January 1, 1947 are not entitled to receive the lapel button.

(e) With respect to those few personnel eligible to receive the lapel button in accordance with this Circular who may have been separated without

having received the button, issuance is authorized by cognizant district commanders upon request through presentation by the individual, either in person or by mail, of documentary evidence indicating honorable service on active duty for any continuous period between 9 September 1939 and 31 December 1946.

(f) Upon delivery of the Honorable Service Lapel Button to personnel now serving on active duty: in the case of officers, a signed receipt, Form CG-2927, annotated to reflect the receipt of the button, will be forwarded to Headquarters; in the case of enlisted men, an entry will be made in the appropriate article of the Service Record of the recipient over his signature.

* * * * *

By direction of the Commandant.

(S.) R. T. McElligott,
*Chief, Office of Personnel.*

UNITED STATES COAST GUARD

Washington 25, D. C.

8 August, 1945

PERSONNEL BULLETIN No. 75-45

Subj: Temporary members of the Coast Guard Reserve; policy and instructions respecting disenrollments.

1. Personnel Bulletins No. 22-44, dated 9 February, 1944, and No. 109-44, dated 10 August, 1944, and the Commandant's Directive to all DCGO's of 3 November, 1943, regarding the disenrollment

of temporary members of the Reserve, are hereby superseded and canceled.

*Disenrollment*

* * * * *

6. DCGO's may disenroll a Temporary Reserve Officer, except Pilots, (see paragraph 7, below), upon their own authority only for the following reasons:

(a) Upon completion of service, or if the services of the officer are no longer required.

(b) For the officer's own convenience.

(c) For physical or mental disability upon certificate of a medical officer of the Public Health Service or Navy recommending same, provided the physical or mental disability is not due to own misconduct.

7. Disenrollments of Temporary Reserve Officers for any reason other than those specified above shall be effected only upon authority of the Commandant. Disenrollments, for any reasons, of Pilots who have been enrolled as temporary members of the Reserve may be effected only upon authorization by the Commandant.

* * * * *

12. The inclosed "Temporary Reserve Disenrollment Table" [19] showing the different types of dis-

[19] The portion of that table here relevant lists as "Conditions Affecting Disenrollment" for "Own Convenience" the following:

1. Change in Business Conditions.
2. Due to physical condition or health.
3. Change of Residence.
4. Did not accept unassigned status.
5. Entered Armed Forces.

enrollments authorized for Temporary Reservists, and the conditions affecting such disenrollment, is for your convenience in preparing disenrollment Form NAVCG-2742 and service record cards, and to standardize the terminology used for the reasons of disenrollment, throughout the districts.

* * * * *

By direction of the Commandant

(S.) J. F. FARLEY,
*Chief Personnel Officer.*

Incl.
Temporary Reserve Disenrollment Table.

UNITED STATES COAST GUARD

Washington

Headquarters 11 January, 1943.

PERSONNEL BULLETIN No. 3-43

Subject: Civilian Personnel; enrollment of as temporary members of the U. S. Coast Guard Reserve.

1. Headquarters has had under study for several months the subject of bringing into the military establishment of the Coast Guard civilian personnel holding key positions where such procedure would be to the advantage of the Coast Guard in furthering the war effort. To this end the following policy has been formulated, subject to such change from time to time as may be found desirable:

2. Merchant Marine Inspectors will be offered enrollment as temporary members in the U. S.

Coast Guard Reserve in ranks that, with but few exceptions, are in accordance with the recommendations of a board which was convened at Coast Guard Headquarters for the purpose of determining such ranks. Other technical and semi-technical civilian personnel will be offered enrollment as temporary members in the Coast Guard Reserve in accordance with the recommendations of a second board which was convened at Coast Guard Headquarters for the purpose of determining their appropriate ranks or ratings.

3. The enrollees will be placed on full-time active duty without pay. Because they are on active duty, they will wear the uniform of their rank or rating and will be entitled to a uniform allowance of not to exceed $250. They will continue to receive their Civil Service pay, and no phase of their Civil Service status will be disturbed by their enrollment.

4. If it becomes desirable to order any of this group to duty either at sea or beyond the continental limits of the United States, or to special duty where it is clearly to the advantage of the Government to enroll them in the (Regular) U. S. Coast Guard Reserve, if they consent and if they are found physically and otherwise qualified, they will be commissioned in the (Regular) Coast Guard Reserve. Such commissions will be issued generally in the rank in which the officer served as a temporary member of the Reserve.

5. Offers of enrollment will be made as soon as possible by separate letter to each person concerned. If the offer of enrollment is accepted, the employee will present himself before the District

Coast Guard Officer of his particular district or at Coast Guard Headquarters, whereupon he will be enrolled as a temporary member in the Coast Guard Reserve in the rank or rating offered. If the offer of enrollment is declined, the man will remain in his Civil Service capacity without prejudice.

6. Merchant Marine Inspectors, and others of this group, holding Merchant Marine licenses or otherwise qualified for sea duty on salt water, and desiring sea duty, should make application for such duty to Headquarters through official channels.

(S.) ROBERT DONOHUE.

ADMINISTRATOR'S DECISION, VETERANS ADMINISTRATION, NO. 699

May 20, 1946.

Subject: ENTITLEMENT OF TEMPORARY MEMBERS OF THE COAST GUARD RESERVE TO BENEFITS UNDER LAWS GOVERNING THE VETERANS ADMINISTRATION

QUESTION PRESENTED: Are former temporary members of the Coast Guard Reserve within the purview of the statutes providing for National Service Life Insurance, pension, or medical and hospital services, as beneficiaries of the Veterans Administration?

FACTS: The Acting Commandant of the United States Coast Guard states that temporary Reservists of the Coast Guard are divided into six classifications, as follows:

"(a) For active full-time duty with military pay and allowances.

"(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

"(c) Pilots without pay and allowances other than for uniforms but paid by their own companies.

"(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms but paid by their own companies.

"(e) Coast Guard police without pay and allowances.

"(f) Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation of their civilian positions."

In explanation of the six classifications, the Acting Commandant says:

"(a) Very little, if any, distinction is made between this group and regular members of the Reserve of similar ranks or ratings with the exception that the former were generally limited in the performance of duty to shore stations within the continental limits of the United States and on vessels operating from continental shore bases.

"(b) This constitutes that large group of men who for patriotic reasons wished to serve a certain amount of time to relieve regular Coast Guard personnel in the protection of our ports and waterfronts and the patrol of these waterfronts. Their service was purely voluntary and their only compensation was a uniform allowance if they consistently served twelve hours a week.

"(c) Pilots throughout the country were enrolled and put in uniform in officer rank as far as possible comparable to their position of authority

as pilots. This was done for military convenience to make it possible to exercise a certain amount of military control over these men in time of war and to clothe them in some military authority.

"(d) Ore-carrying vessels going through the Soo Locks were in the minds of many a likely field for sabotage. The examination and search of vessels was a duty ordinarily devolving upon the Coast Guard but the enormity of the job and lack of personnel made it expedient to commission officers of these vessels, again as military convenience, so that they could make the examinations and enjoy the authority which the uniform would give them, as well as the military control over them which the Coast Guard would then have.

"(e) The protection of plants vital to the war effort made it necessary for the Army and Navy, whose responsibility for the protection of these plants it was, to militarize the civilian guards at these plants. The Army used the Auxiliary military police but the Navy turned to the Coast Guard for enrollment of these men as temporary members of the Reserve, the objective being the added authority by a member of the military forces and military control in emergencies. The legal status of these men was never determined to the point where they actually had the authority hoped for, and the Navy abandoned the program upon the advice of Congress, in February of 1944.

"(f) It was decided as a matter of administrative policy to enroll as temporary members of the Reserve a number of Coast Guard civilian key employees, both here at Headquarters and in its field offices. Such employees were, for the most

part, performing technical and professional services, and due to their close association with military personnel it was determined that the interests of the Service required the militarization of those employees. They continued to perform the same duties, and retained their Civil Service status and received Civil Service pay."

COMMENT: The Reserve of the Coast Guard was established by Public No. 8, 77th Congress, entitled,

> "An Act to provide for the establishment, administration, and maintenance of a Coast Guard Auxiliary and a Coast Guard Reserve."

Section 207 of that Act, as amended by Public Nos. 599, 762, and 773, 77th Congress, provides:

> "'SEC. 207. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard and such persons (including Government employees without pay other than the compensation of their civilian positions), who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Territories or possessions, including

the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.' "

It is at once apparent that as to all such classes except (a) there is no question that they are not in what is ordinarily referred to as the "active military or naval service". For the purpose of benefits in the system stemming from Public No. 2, 73d Congress, including pensions, compensation, medical, hospital and domiciliary care, burial, vocational rehabilitation, loan guaranty or insurance, employment, readjustment allowances, and similar benefits, such service is defined as follows:

"II. The term 'military or naval forces' shall mean the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and all other branches of the United States service while serving pursuant to law with the Army or Navy.

"III. The term 'person who served' shall mean a person, whether male or female and whether commissioned, enlisted, enrolled or drafted, who was finally accepted for active service in the military or naval forces of the

United States, members of training camps authorized by law, and such other persons heretofore recognized by statute as having a pensionable status." (Veterans Regulation No. 10.) (Amendments to paragraph III by section 10, Public No. 144, 78th Congress, and by Public No. 301, 79th Congress, not material to the issue here involved.)

For insurance purposes section 601 (c) of the National Service Life Insurance Act, provides:

"(c) The term 'active service' means active service in the land or naval forces (including the Coast Guard) of the United States and service in the land or naval forces of the United States under the Selective Training and Service Act of 1940, but the service of any person ordered to active duty in any such force for a period of thirty days or less, shall not be deemed to be active service in such force during such period;" (Amendments to section 601(c) by section 10, Public No. 144, 78th Congress, and Public No. 301, 79th Congress, not material to the issue here involved.)

As to class (a) it is clear they are in the active naval (Coast Guard) service unless, as the Congress has the power to do, they have been excepted by statute.

In connection with the question of the status of the temporary members of the Reserve under Selective Service, section 208, Public No. 8, 77th Congress, provides:

"Sec. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same ex-

emption from registration and liability for training and service as members of the Naval Reserve, and no member of the Reserve, other than temporary members thereof, shall be a member of any other naval or military organization except the Auxiliary or the Coast Guard as provided for in sections 214 and 215 of this title: Provided, That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their statu as temporary members of the Reserve terminated."

Examination of section 5 (a) of the Selective Training and Service Act of 1940 (Public No. 783, 76th Congress, as amended) listing those exempted from registration and liability for training and service thereunder, would seem to require the conclusion that as *all* temporary members of the Reserve were not exempt from "registration and liability for training and service", and that those who were members of any other military reserve "if ordered to active duty therein, shall be forthwith released from *all active duty* with the Coast Guard, and their status as temporary members of the Reserve terminated." (Emphasis supplied.) It was the intent of the Congress that such temporary Reserve was not to have a status identical with that of those organizations of the military establishment whose members were exempted from registration, training and service.

There having been called to attention the fact that as to group (a), it had been held by the Judge Advocate General of the Navy that temporary

members of the reserve had veteran status under the Civil Service laws, and that, in other opinions, it had been held that such force constituted a part of the forces "in active service", copies of these opinions were secured to ascertain whether the legal principles therein applied were persuasive to the view that such temporary members of the Coast Guard Reserve were within the purview of the laws governing the Veterans Administration. Examination thereof shows the following:

In an opinion dated April 11, 1944, on the eligibility of temporary members of the Coast Guard Reserve to receive mustering-out pay, under Public No. 225, 78th Congress, it was stated:

> "* * * Since temporary members of the Coast Guard Reserve are not in terms excepted from the cited statute as being ineligible to receive the benefits therein prescribed, it would appear that they are entitled to said benefits unless otherwise precluded therefrom. * * *"

The opinion then goes on to point out that approximately 70,000 persons enrolled as temporary members of the Coast Guard Reserve, for full-time, part-time or intermittent active duty, with or without pay, including Government employees without pay other than compensation for their civilian positions, being enrolled under formal contracts for the duration of the war, unless sooner terminated by the Coast Guard, in the six classifications mentioned in the letter from the Acting Commandant of the United States Coast Guard of October 26, 1945, as quoted above; that classifications (b) to (f) inclusive, do not receive military pay or allow-

ance other than uniform allowances; that such members retain civilian positions held at the time of enrollment and work at them for full pay either while performing their duties or when not performing duty. As to the groups falling within subparagraphs (b) to (f), inclusive, who serve without pay, the opinion concludes that as mustering-out pay constitutes—

> "* * * *pay*, which is additional to the *pay* to which the veteran was entitled at the tim of his discharge or relief from active service. * * *"

it cannot be paid. This opinion, which is not based on the status, duties, etc., of temporary members is of no persuasive force in the present question.

An opinion of July 15, 1944, dealt with the status of temporary members under sections 203 and 302 of Public No. 277, 78th Congress, which provided for the printing and distribution of post cards to be used as applications for ballots, registration, etc. Section 302 defined those to whom the Act applied and included members "of the armed forces" of the United States. The specific question was whether temporary members of the Coast Guard Reserve came within the specific phrase.

The opinion holds that as members of the Coast Guard Reserve, temporary, are subject to the laws and regulations for the government of the Navy, they are members of the armed forces and within the purview of Public No. 277. This opinion, likewise, is not believed to be authority as regards the question of entitlement under the laws governing the Veterans Administration, which are provided for on the basis of active service, etc.

In an opinion of the Acting Judge Advocate General of the Navy of September 16, 1944, on the question as to "veteran's status" of temporary members of the Reserve, there was cited an opinion of the United States District Court for the Eastern District of Pennsylvania (in re petition of James H. Brown, boatswain's mate, first class, U. S. Coast Guard Reserve (Temporary) for the writ of Habeas Corpus vs. John J. Cain, Warden of the Prison of Delaware County, Pennsylvania), decided in June 1944, in which the court held in part, as follows:

> " 'The relator has been since December 21, 1942 an enrolled temporary member of the Coast Guard Reserve, with the rating of Boatswain's Mate, First Class. *As such he was a member of the armed forces of the United States.*' " (Italics supplied.)

There is cited in the opinion the fact that the Veterans Administration has held that temporary members of the Reserve may not receive the benefits of National Service Life Insurance and that such reservists when killed or injured in line of duty are entitled only to the benefits prescribed by law for civilian employees of the United States. The opinion then concludes:

> "7. It would therefore appear that for certain purposes and under certain circumstances members of the Coast Guard Reserve (Temporary) are considered members of the armed forces of the United States, though in a limited status, and are not entitled to all the rights and benefits accruing to members and veterans of the armed services.

"8. In view of the foregoing, I am of the opinion that only those members of the U. S. Coast Guard Reserve (Temporary) who perform full time active duty with military pay and allowances and who by reason thereof are eligible upon separation from the service to mustering-out payments under Public Law 225—78th Congress (Mustering-Out Payment Act of 1944) should be considered as naval veterans."

The statement made by the Judge Advocate General of the Navy that the definition of the term "active service" for one purpose would not be controlling, (as a matter of fact it may not even be persuasive) on any question which would involve the interpretation of these words under any other law, is concurred in.

The term "active service" under the laws governing the Veterans Administration, has been consistently defined by the Veterans Administration as applying to those in the active military or naval service as such, and not as a quasi-military or civilian adjunct thereto.

In letter dated October 24, 1942, to the Commandant, United States Coast Guard, it was stated, in part:

"Further reference is made to your letter requesting to be advised as to the effect on the payment of veterans' benefits or retired pay of persons (1) who enroll in the Coast Guard Reserve as temporary officers or enlisted men, pursuant to Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as such section was amended by Public Law No. 599, 77th

Congress, approved June 6, 1942, where no Coast Guard pay and allowances are involved, (2) who enroll in the Coast Guard Reserve as temporary officers or enlisted men with pay and allowances of their rank or rating, and (3) whether the situation would be different in any case under (2) if the enrollee would agree to waive the receipt of any such veterans' benefits or retired pay for the period of his Coast Guard service.

"In my letter to you of August 3, 1942, referred to in your present inquiry, it was stated, in part, that it was reasonable to conclude that the status of temporary officers and enlisted men in the Coast Guard Reserve is not that of a person in the active service in the military or naval forces (including the Coast Guard) of the United States, and that I was constrained to advise that such persons were not eligible for National Service Life Insurance. For the same reasons which influenced this decision I am of the opinion that such temporary officers and enlisted men in the Coast Guard Reserve are not in the active service of the Navy, including the Coast Guard, within the purview of the statutes and regulations which would prohibit the payment of veterans' benefits or retired pay to persons in receipt of active service pay. * * *"

In XC-3,132,330, 77 Sol. 183, there was considered on November 24, 1944, the question as to the validity of an application for National Service Life Insurance executed by the applicant when enrolled as a temporary member of the United

States Coast Guard Reserve, the application having been executed after he was placed on active duty with full pay.

The opinion called attention to advice previously given the Commandant of the United States Coast Guard, that temporary members of the Reserve do not have the status of persons in the active service in the naval forces and held—

> "* * * As the application of February 26, 1942, was made while the applicant was a member of the temporary reserve, its rejection was proper, * * *"

The status of temporary members of the Reserve of the Coast Guard, under the laws governing the Veterans Administration, parallels that of the Women's Army Auxiliary Corps under such laws. In discussing the question whether a veteran's widow would be precluded from receiving concurrently death pension (as a widow) and pay as a member of the Women's Army Auxiliary Corps because of the statutory provision that—

> "No pension shall be allowed or paid to any officer, noncommissioned officer, or private in the Army, Navy, or Marine Corps of the United States, either on the active or retired list." (38 U. S. C. 26; 26 Stat. 1082.)

in XC-2,969,369, 63 Sol. 598, [Administrator's Decision No. 502] it was stated:

> "* * * Without commitment as to whether any statute, or other law, would preclude payment of pension to a widow in the active military service, the instant case may be

disposed of by determination that the enrollment of the veteran's widow as a private in the Women's Army Auxiliary Corps does not constitute active military service. The status of members of the Women's Army Auxiliary Corps is similar in some respects to officers and enlisted men of the Army. Section 13 of Public No. 554, 77th Congress, approved May 14, 1942, creating the Women's Army Auxiliary Corps, provides that the Corps shall be administered by the Secretary of War through the channels of command of the Army pursuant to such regulations as the Secretary may promulgate and that the Secretary is authorized to prepare and issue any and all regulations, rules or orders and to employ any and all of the facilities of the War Department and of the Army of the United States to carry into effect the provisions of that Act.

* * * * *

"Moreover, the provisions of Sections 11 and 12 of the Act show that it was not the intent of Congress to incorporate the Women's Army Auxiliary Corps into the Army of the United States but that it was intended that the Corps should serve as an auxiliary with the Army. Section 11 provides, in part, in case of the injury or death of any member of the Corps incurred in active service in the Corps, for the payment to the member or her beneficiary of all benefits prescribed by law for 'civilian employees' of the United States who are physically injured while in performance of duty or who die as a result thereof. This

> section also provides that the United States Employees' Compensation Commission shall have jurisdiction in such cases and shall perform the same duties with reference thereto as in the cases of 'other civilian employees of the United States' so injured or otherwise incapacitated. It is further stated in the same section that employees' compensation under that Act shall not be paid concurrently with active duty pay or pension based upon active service. * * *"

It was thereupon concluded that service in the Women's Army Auxiliary Corps was not "active service" within the meaning of the 1891 Act, supra, and therefore that the widow, not being in receipt of active service pay, was not precluded from receiving, concurrently, both pension as a widow and pay as a member of the Women's Army Auxiliary Corps.

Another opinion dated November 28, 1944, approved November 29, 1944, held that service in the Women's Army Auxiliary Corps was not active service within the contemplation of Public No. 346, 78th Congress.

As to temporary members of the Coast Guard Reserve, section 211, Public No. 8, 77th Congress, provides:

> "Members of the Reserve, other than temporary members thereof, who suffer sickness, disease, disability, or death in line of duty shall be entitled to the same benefits as are or may hereafter be prescribed by law for members of the Naval Reserve who suffer sick-

ness, disease, disability, or death under similar conditions."

Section 212 of the same Act, provides:

"When any temporary member of the Reserve is physically injured in line of duty while performing active Coast Guard service, or dies as a result of such physical injury, he or his beneficiary shall be entitled to all the benefits prescribed by law for civil employees of the United States, and the United States Employees' Compensation Commission shall have jurisdiction in such cases and shall perform the same duties with reference thereto as in the case of civil employees of the United States. Temporary members of the Reserve who contract sickness or disease while performing active duty shall be entitled to the same hospital treatment as is afforded members of the regular Coast Guard."

Section 212 (a), (added by Public No. 447, 78th Congress), provides:

"'Sec. 212. (a) In case of physical injury or death resulting from physical injury—

"'(1) to any temporary member of the Reserve when incurred after February 19, 1941, in line of duty as a member of the Reserve, while on active duty or engaged in authorized travel to or from such duty; or

"'(2) to any member of the Auxiliary not on active duty as a member of the military or naval forces, when incurred after February

19, 1941, while on Coast Guard patrol pursuant to the request of competent Coast Guard authority, and which would have been incurred in line of duty in the active service had he been a member of the Reserve acting under competent orders; the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916 (5 U. S. C., ch. 15), as amended, subject to the other subsections of this section, shall apply, and such Act shall be administered by the United States Employees' Compensation Commission (hereinafter called the Commission) in the same manner and to the same extent as if such person were a civil employee of the United States and were injured while in the performance of his duty: Provided, That for benefit computation, regardless of pay or pay status, such person shall be deemed to have had monthly pay of $150.' ".

In Report No. 1093, (Senate 78th Congress, 2nd Session) accompanying H. R. 3704, the Bill enacted as Public No. 447, 78th Congress, it was stated apropos benefits under the Bill that:

"It will be noted from the foregoing schedule of benefits that these, in general, would conform to the benefits provided under laws administered by the Veterans' Administration and, like those laws, would be afforded without regard to the pay status or rank of the individual concerned."

A number of Bills have been introduced in the present Congress for the express purpose of granting a status to temporary members of the Reserve under the laws governing the Veterans Administration. A report to the Director, Bureau of the Budget, on one of these, S. 1465—

"'A Bill Extending certain recognition and rights to temporary members of the United States Coast Guard Reserve, including the Voluntary Port Security Force, and members of the Coast Guard Auxiliary' ", on November 30, 1945, reads in part:

> "The purpose of the bill is to grant disability and death compensation, pensions, allowances, and other benefits to temporary members of the Coast Guard Reserve and members of the Coast Guard Auxiliary who suffer physical injury or death resulting from physical injury incurred after February 19, 1941, in the performance of certain duties for which the benefits provided by the United States Employees' Compensation Act of September 7, 1916, as amended, are now provided, by considering the injury thus sustained as having been incurred by any such member in line of duty as a member of the Regular Coast Guard. The bill further provides for the furnishing of a certificate of honorable service or an honorable discharge under certain conditions and extension of the benefits of the Veterans' Preference Act of 1944 to persons who have performed certain services and received a certificate in evidence thereof.

* * * * *

"Under Section 211, Act of February 19, 1941, members of the Reserve *other than temporary members thereof* who suffer sickness, disease, disability or death in line of duty are entitled to the same benefits as those now or hereafter prescribed by law for members of the Naval Reserve under Public Law 775, 76th Congress, August 27, 1940, as amended (34 U. S. C. 855 c-1-2) who suffer sickness, disease, disability or death under similar circumstances. Temporary members of the Reserve, on the other hand, are not entitled to such benefits, but are eligible, in case of physical injury or death resulting from physical injury incurred after February 19, 1941 in line of duty as a member of the Reserve while on active duty or engaged in authorized travel to or from such duty to the benefits provided civilian employees of the United States under the United States Employees' Compensation Act, as amended; and for benefit computation, regardless of pay or pay status are deemed to have had monthly pay of $150.

"It has long been the policy of the Congress to restrict veterans' benefits, as such, to persons who served in active military or naval service, and it is the view of the Veterans' Administration that the basic requirement of active military or naval service as a prerequisite to entitlement to such benefits under laws administered by the Veterans' Administration is fundamentally sound. Service such as that rendered by temporary members of the Coast Guard Reserve and members of the Coast Guard Auxiliary is recognized as essentially

civilian service and provision is made for such members through extension to them of the benefits provided for civilian employees of the United States and certain civilian groups subjected to war hazards, under the United States Employees' Compensation Act, as amended."

As already shown above, it has been the consistent view of the Veterans Administration that where the organic Act restricts the potential right of a beneficiary thereunder to benefits "prescribed by law for civil employees of the United States" as does section 212, Public No. 8, 77th Congress, as amended, any person whose rights are governed by such Act is not entitled to pension benefits under the laws governing the Veterans Administration in the absence of specific legislation extending benefits to them. This was one of the premises resulting in the conclusion that the Women's Army Auxiliary Corps was not within the purview of any of such laws until Public No. 10, 78th Congress, specifically extended hospitalization, domiciliary care and burial benefits to such Corps.

It is also to be noted that in 77 Sol. 183, the words "active service" as used in section 601 (c) of the National Service Life Insurance Act were defined as not including a temporary member of the Coast Guard Reserve, even though on active full-time duty with pay. (Group (a).)

HELD: Temporary members of the Coast Guard Reserve are not within the purview of the laws governing the Veterans Administration for pension, National Service Life Insurance or medical and hospital services as beneficiaries of the Veter-

ans Administration. (Opinion of the Solicitor, Veterans Administration, dated March 15, 1946.)

This decision is hereby promulgated for observance by all officers and employees of the Veterans Administration.

(S.) OMAR N. BRADLEY,
*General, U. S. Army,*
*Administrator of Veterans Affairs.*

☆ U. S. GOVERNMENT PRINTING OFFICE 1946 [illegible] 178

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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1949

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

WILLIAM I. CONNELLY and BERTHA CONNELLY,

---

## REPLY TO PETITION FOR WRIT OF CERTIORARI.

---

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

No. 744.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

WILLIAM J. CONNELLY and BERTHA CONNELLY.

## REPLY TO PETITION FOR WRIT OF CERTIORARI.

### OPENING STATEMENT.

Stripped of its innuendoes, unbecoming and unjustified criticism of the United States Court of Appeals for the District of Columbia Circuit, and incomplete statements of fact, the petition for certiorari falls far short of stating a case in which this Honorable Court should exercise its discretion to grant a writ of certiorari and re-examine the well considered opinion of the Court below. For the reasons hereinafter set forth, the respondent contends that the United States Court of Appeals for the District of Columbia very properly differentiated the case at bar from the decision of this Court in the case of *Mitchell* v. *Cohen*, 333 U. S. 411, the petitioner to the contrary notwithstanding.

## FACTS NOT SHOWN IN PETITION FOR WRIT OF CERTIORARI.

The taxing statute involved, (Sec. 22b (13) (A)) of the Internal Revenue Code, allowed an exclusion of $1,500 from the compensation received by a *commissioned officer* for *active service* in the military or naval forces during World War II. The two important requirements, accordingly, are that the taxpayer must have been (1) on active service and (2) he must have been a commissioned officer. There is nothing in the taxing statute limiting the right to the exclusion based on the source of his compensation, notwithstanding petitioner's argument that the agency of the Government which pays the salary of the officer determines his status.

Petitioner repeatedly has stressed and labored certain factors which tend to make taxpayer look like a civilian. The following additional facts, however, are in the record but not found in the petition for certiorari, and it is believed that these unmentioned facts plus the law of the case conclusively place the taxpayer in the class entitled to the exclusion as provided in the tax law.

1. Taxpayer was enrolled not only as a temporary member of the United States Coast Guard Reserve but also as a *commissioned officer* thereof with the rank of lieutenant commander (R. 35) and later commander, from February 19, 1943, through September 15, 1945.

2. Taxpayer was assigned to full-time, active special duties at Coast Guard Headquarters, (R. 16, 17, 18)

3. As said commissioned officer, taxpayer was entitled to receive, among other things

| | |
|---|---|
| a. Ship Service Stores | (R. 27) |
| b. Traveling privilege | " |
| c. Officers' Mess and Wine Mess | " |
| d. War ballott | (R. 28) |
| e. Badge and medals | (R. 26, 27) |
| f. Military etiquette and courtesies | (R. 26) |
| g. Burial in Arlington | " |

4. Taxpayer had the *all* authority, title, duties and obligations of a commissioned officer by congressional statute, and he was sworn in as such by congressional authority.

5. Taxpayer was required to be in uniform at all times and was subject to orders 24 hours per-day (R. 37, 38)

6. Taxpayer was subject to disciplinary action if he traveled more than 50 miles away from Coast Guard Headquarters without written permission of his commanding officer. (R. 38)

In addition to the above, the taxpayer was fully subject to the Articles for the Government of the Navy, to military discipline, including court martial, and had to obey all lawful orders from superiors, 14, U. S. C. A. Sec. 309, 310.

## INACCURATE STATEMENTS IN PETITION.

There are two inaccuracies in the petition to which attention is respectfully invited:

On page 3, a statement is made that

> "by the terms of his enrollment, the taxpayer was to receive no pay or allowances other than the compensation of his civilian position which he continued to hold, and his duties were to be performed in the classification known as 'Coast Guard Civil Service Employees'" (R. 16 * * *).

It should be carefully borne in mind that the quoted statement applied *not* to the respondent's *original* enrollment, but to the document which was furnished him over a year later when he was promoted to the rank of Commander.

At page 4, it is stated

> "* * * apparently, his disenrollment could be secured at his own convenience, as well as on the initiative of the Coast Guard".

It will have been noted that the taxpayer was disenrolled on September 15, 1945—after the termination of active hos-

tilities" and the original phrasing of the separation document referring to the taxpayer's "own convenience" was revised to show that the reason for disenrollment was "completion of service because of satisfactory completion of assigned duties". (R. 84)

## ARGUMENT.

The writ should be denied because:

### 1. There is No Question of General Importance Present in This Case.

The group represented by this taxpayer was expressly recognized by the decision of this Court in *Mitchell v. Cohen*, 333 U. S. 411, 414 (see footnote 8, group 5) and is one of the smallest of the numerous classes of individuals who were brought into the Coast Guard Reserve as an incident of the war.

In the opening pages of the record before the Tax Court, the following statement appears:

> "I would like to state here if I may, Your Honor, that this is one of approximately 300 similar cases. There were approximately 300 professional and technical people who were then in the Coast Guard and were taken into the Reserve and who continued, as I explained, to receive the compensation of the position they held when taken in."

Because of the unnecessary prolongation of this litigation due to the disinclination of the petitioner to move the case to a final determination in the Court below, and the running of the three-year statute of limitations provided by 26 U. S. C. 322(b), it is believed that not more than one hundred persons in this group who have been kept informed of the progress of this case and have preserved their rights, will be affected by the decision of the United States Court of Appeals for the District of Columbia Circuit for the tax years in question, namely, 1943, 1944, 1945, and, in part, 1946.

**2. There is No Question of Substance Relating to the Construction or Application of the Constitution or Statutes of the United States Which Has Not Been and Should be Settled by This Court.**

The Veterans Preference Act of 1944, 58 Stat. 387, 5 U. S. C., Sec. 851, on which the entire controversy in *Mitchell* v. *Cohen* turned, is not involved, has not been invoked, and can have no bearing upon the decision in this case. The sole question in the case at bar is the interpretation of Section 22 (b)(B)(A) of the Internal Revenue Act and its effect upon the respondent and some hundred, or less, other persons whose present situation is similar to his. The respondent wishes to emphasize that there are not 70,000 people to be affected by the decision in this case, as there was in *Mitchell* v. *Cohen* and the income of the respondent and the people similarly situated, can be reliably estimated at less than $6000 with very few exceptions.

Respondents urge that refusal to grant the writ will not work any hardship upon the United States as represented by the Commissioner of Internal Revenue, as the subject is one which does not require an adjudication by this Court.

After the War was over, Congress repealed so much of the section of the statute as allowed the Commandant to enroll government employees like respondent. Unless a similar emergency arises comparable to that which existed in 1942, and unless the Coast Guard again wants to utilize the services of its civilian personnel under an identical formula, no similar tax situation can arise. Such an identical set of circumstances is improbable to the point of impossibility.

### 3. The United States Court of Appeals for the District of Columbia Circuit Has Given Proper Effect to an Applicable Decision of This Court in Disposing of the Case at Bar.

The Court of Appeals for the District of Columbia Circuit has not, as contended by petitioner, relied on its own opinion in *Mitchell v. Cohen*, 160 F. 2d. 915, in disregard of the reversal of that case by this Court. Early in the argument before the Court below, the question arose respecting the applicability of *Mitchell v. Cohen* to this case, and the distinction between the *Mitchell* case and this was readily discerned by the Court. The opinion of the Court of Appeals in the case at bar refers to the decision of this Court in the *Mitchell* case and accepts the definition of "ex-serviceman" insofar as the Veterans' Preference Act of 1944 was intended to apply to temporary members of the Coast Guard Reserve serving as participants in the *Port Security* program. But the Court of Appeals very properly distinguished the *Mitchell* case from this case upon a standard which had been recited in the appellate court opinion in the *Mitchell* case which has not been questioned or rejected by this Court upon review.

The Court of Appeals has said,

> "* * * we adhere to those views for purposes *other than that statute*."

which is substantially the language employed by this Court at page 321 of its opinion in the *Mitchell* case.

The controversy here raises the question as to whether the taxpayer had a civilian status or a military status during World War II. The petitioner ties military pay with military services and argues that if the pay is from a civilian government payroll, then military status is lacking. The United States Court of Appeals for the District of Columbia Circuit, in dealing with this point, stated:

> "The second feature which gives rise to the dispute, is the nature of petitioner's pay. He was on full-

> time active service, and he was compensated. But the Commissioner points to that part of the Coast Guard Auxiliary and Reserve Act (Sec. 207, *supra* note 7) which referred to the enrollment of 'Government employees without pay other than the compensation of their civilian positions'. He argues that petitioner, being in that category, did not receive 'military pay'. The revenue act does not use that term. Its term is 'compensation . . . for active service'. To reach the conclusion that petitioner's compensation was not for service in the naval forces we would have to hold that he worked full time for no compensation while, at the same time, he received full compensation for no work. The facts are that he was engaged in full-time active duty in the naval forces, and he received compensation. We think he received the compensation for the work."

Taxpayer believes that logic and reason support the above conclusion. In *Mitchell* v. *Cohen*, *supra*, the temporary members of the Coast Guard Reserve involved performed part-time duties only without compensation and without interruption to their regular employment. The Veterans Preference Act of 1944 established preference in government employment for "ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States". In construing the term "ex-servicemen", this Court stated that the word applied "to those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life". It cannot be denied that in the instant matter the respondent was a commissioned officer as a temporary member of the Coast Guard Reserve. He was on full-time active duty, and the fabric of his normal economic and social life was disrupted. The fact that his compensation came from an appropriation allocated to a civilian position is not material under the terms of the taxing statute, and as far as taxpayer was concerned, he could not have been any more in the military service than he was even had he been paid from so-called military appropriations.

The particular facts with respect to this taxpayer are that as the result of many years work for the Government as a civil service employee, he was a specialist in admiralty law and the legal aspects of maritime matters generally. On March 1, 1942, as a war measure (Executive Order 9083, February 28, 1942) he was transferred with a number of other persons from the Department of Commerce to the United States Coast Guard.

In January 1943, he was asked to consider enrollment as a temporary member of the Coast Guard Reserve which had been established by Act of Congress of February 19, 1941 (14 U. S. C. A. 301, et seq., 56 Stat. 1021) but he declined to take any steps at that time towards that end. (R. p. 36) Later he reconsidered and filed the necessary application (R. p. 36), realizing that his specialized knowledge and experience would undoubtedly be useful to the Coast Guard in the war effort, although he was not eligible for general sea duty because of his age of 49 years.

Thereupon, at five o'clock on the afternoon of February 19, 1943, he was sworn in and took the prescribed oath of office as an officer of the Coast Guard. (R. p. 35) On that date he was given the rank of Lieutenant Commander and assigned full-time, active, special duties at Coast Guard Headquarters and informed that such uniforms as might be required would be furnished him. (R. p. 17) He signed the formal acceptance of enrollment as Lieutenant Commander and the written oath of office.

He was disenrolled as Lieutenant Commander and immediately reenrolled as Commander on April 24, 1944, (effective for pay purposes March 15, 1944).

This taxpayer maintains that *by virtue of the terms of the Coast Guard Reserve Act his status as a commissioned officer attached at the time of his enrollment on February 19, 1943, and continued until his disenrollment, under honorable conditions after satisfactory service, on September 15, 1945.*

It is the *status* of the taxpayer which is the question primarily in issue. Once he had gone through with the ceremony prescribed by the Coast Guard, taxpayer was in *a military status*, by virtue of the *law* under which he was enrolled. Pronouncements by taxing authorities and others to the effect the appellant was really "a civilian dressed up to look like an officer" are of no avail or meaning insofar as they deny his military status, since it is the *law* that fixed and controlled his status once he had taken the oath.

The Tax Court, in its decision, and the petitioner, have fallen into error by not properly differentiating between "status" and "rank" or between "status" and "duties." Under Sec. 307 of the Coast Guard Reserve Act the Commandant could change a man's *status* from a civilian to military, confer on him any rank between apprentice seaman and captain and assign him to whatever duties he, the Commandant, might prescribe. On February 19, 1943, the Commandant *did change* taxpayer's *status from* civil service to military service when the oath was administered and simultaneously conferred on the petitioner the *rank* of Lieutenant Commander and assigned him to full-time, active, special *duty*.

There is only one Coast Guard Reserve and it is composed of regular and temporary members. (Stip. R. 15) Under Sec. 204, Title II of the Coast Guard Auxiliary and Reserve Act of 1941 (55 Stat. 11), it is provided that

> "The Reserve shall be a *military organization* administered by the Commandmant", *etc.*

The enrollment by taxpayer as a commissioned officer did have a definitely restricted effect upon his civilian life. The disruption in such regard is shown in the record as follows (R. p. 38):

> "Q. After you took the oath of office as a temporary reservist, how was your life as a civilian affected? A. Well, before I took the oath of office I was required to report for duty in the morning at eight o'clock and at 4:30 in the evening I was through, if I so chose. After

I took the oath of office I learned that I was under the complete control and authority of the Coast Guard for 24 hours a day, that my orders so stipulated.

"I would require a written permission from my commanding officer before I could leave the base and go to a distance of more than 50 miles, without being exposed to the risk of arrest by the shore patrol or other authority.

"If I happened to have two or more guests at my home I was required to don the regulation uniform and wear it at all times, and by that I mean that the regulation uniform as worn in my home had to conform in all respect to the regulations. Nothing of informality was attached to that wearing of the uniform.

"I was required to exchange the customary courtesies of salute when the salute was tendered to me or when under certain circumstances I should initiate it as being the junior officer.

"If by any chance I was indisposed, could not report to duty, instead of calling up my secretary and having her put me on the sick list, I had to report through the duty officer of the Coast Guard, and that duty officer would make the necessary report not only to my commanding officer and the chief counsel, but also any other reports that were necessary to be made.

"Q. In other words, there was a direct impact of considerable consequence on your civilian life? A. There was a direct impact in the sense that in any transgressions I might indulge I was subject to all the Navy regulations as respects discipline, and that could, under appropriate circumstances, amount to a general Court Martial.

"Q. And were you addressed as 'Commander,' as were other officers of your status? A. Yes."

**4. The United States Court of Appeals for the District of Columbia Circuit Has Not Decided a Federal Question in a Manner Conflicting with Any Applicable Decision of This Court.**

Since neither this Court, nor, (so far as is known), any other Court, has had the identical problem presented, namely, the application of the Internal Revenue Act to the income of temporary members of the Coast Guard Reserve *on full-time active duty*, it is abundantly clear that the Court of Appeals has not deviated from what this Honorable Court stated was the law of the case in *Mitchell* v. *Cohen*. On the contrary, the Court of Appeals has meticulously followed that decision, and has very properly discovered a clear distinction between *Mitchell* v. *Cohen*, and *Connelly* v. *Commissioner*.

**5. The Action Taken by the United States Court of Appeals for the District of Columbia Circuit is Not Such as to Require Reexamination by This Court.**

The criticism of the Court below in the petitioner's brief is as unfair as it is unwarranted. The lower Court gave due recognition to the decision of this Court in the *Mitchell* case, and quickly found the distinguishing factors between the two cases and applied the reasoning of this Court to its determination of the case at bar. The dissenting Judge in the Court below gave no reason for his action beyond a simple statement that the holding of the *Mitchell* case was determinative of this case, yet it is quite apparent from his opinion that he gave no weight whatever to the fact that the taxpayer here was on *full-time active duty* in the Coast Guard Reserve, and as such was subject at *all* times to the authority of the Coast Guard for disciplinary purposes, and at *all* times carried the responsibility and authority of other persons of similar rank in the regular Coast Guard, the Coast Guard Reserve, and the Coast Guard Women's Reserve.

As above shown, a person performing full-time active duty is subject to the dislocation of the fabric of a normal economic and social life, and in the case at bar it should be remembered that the benefit claimed by the taxpayer *was asserted during the period of his active service as an officer in the Coast Guard Reserve on full-time active duty.*

Attention is invited to the fact that Section 22(b) (13) of the Internal Revenue Act in effect when the taxpayer filed his return in 1944 *made no distinction between commissioned officers and persons below the rank of commissioned officers*, but extended the right to the exclusion to all members of the military or naval forces of the United States regardless of rank for active service in such forces during the war—"so much of such compensation as does not exceed $1,500." The law was amended in 1945 to segregate the commissioned officers who were still entitled to deduct the $1,500 exclusion, but completely immunized persons below the rank of commissioned officer from Federal taxation in the years of their service during the war. Thus it was always a question of *status* rather than *rank* which determined the right to the exclusion.

In summary, it is fair to say it was with his expert and specialized qualifications for the good of the service, in its prosecution of the war, to have the taxpayer placed in a military status. If the United States Coast Guard had found it more advantageous to retain him in a civilian capacity, it would have done so. However, a change to a military status obviously was deemed essential for the proper discharge of the military work of the United States Coast Guard.

The attitude of the Coast Guard was officially voiced by its Commandant in his Office Memorandum No. 13-43 (R. 64) wherein he said in part:

> "4. It is directed that hereafter temporary members of the Reserve while in the execution of their official duties at Coast Guard Headquarters, occupy the same place in the scheme of Headquarters organization as members of the regular Coast Guard and the regular

Reserve. They shall exercise military authority and accept military responsibility within the scope of their active duty functions, in accordance with the terms of their temporary enrollment, with regard to conditions of service, authority, powers, duties, periods of active duty, etc.

"6. The attention of heads of offices and chiefs of divisions is invited to the fact that one of the principal reasons for the induction of civil service employees into the military establishment as temporary members of the Reserve was to obtain a homogeneous organization on a military basis, and to eliminate differences in procedure and practices applicable to military personnel and civil service personnel engaged on exactly the same duty; and this memorandum is issued in order to effectuate that policy."

A denial of the tax exclusion, therefore, makes for unfair and demoralizing treatment to the taxpayer and other officers, who gave just as much of their time and energy to the service as the regularly officers of the United States Coast Guard stationed at Coast Guard Headquarters. This situation poses the categorical question should not this taxpayer be entitled to take the tax exclusion the same as the so-called "regular" occupying the desk next to him, doing the same kind of work. Surely, they were on the same economic level, and surely the war had a similar effect on their income and resources. There appears to be no justification for any differentiation between them on questions of tax liability.

## CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

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COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

WILLIAM I. CONNELLY and BERTHA CONNELLY, *Respondents*.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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## BRIEF FOR RESPONDENTS.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

No. 57.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

WILLIAM I. CONNELLY and BERTHA CONNELLY, *Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.**

## BRIEF FOR RESPONDENTS.

### RESPONDENTS' STATEMENT OF THE CASE.

This case arises out of an alleged deficiency in the joint income tax liability of the respondents, William I. Connelly and his wife, Bertha Connelly, for the years 1943 and 1944, in the amounts of $433.59 and $227.10, respectively. Hereafter in this brief the word "respondent" refers to William I. Connelly, since the rights of both respondents are identical and derive solely from the status and circumstances of William I. Connelly.

As a result of many years of work for the government as a civil service employee, the respondent was a specialist in admiralty law and the legal aspects of maritime matters generally. On March 1, 1942, he became an employee of the United States Coast Guard in the capacity of a senior attorney, and assumed the position of Chief of the Admiralty and Maritime Section, Legal Division, Coast Guard Headquarters. (R. 23, 24)

In January 1943, he was asked to consider taking a commission as a temporary officer in the Coast Guard Reserve which had been established by Act of Congress of February 19, 1941, as amended (14 U. S. C. 301 et seq., 55 Stat. 1021), but he declined to take any steps at that time towards that end. (R. 24) Later he reconsidered and filed application for such a commission (R. 24), realizing that his specialized knowledge and experience would undoubtedly be useful to the Coast Guard, although he was not eligible for general sea duty because of his age of 49 years.

Thereupon, at five o'clock on the afternoon of February 19, 1943, he was sworn in and took the prescribed oath of office as an officer of the Coast Guard. (R. 23) On that date he was given the rank of Lieutenant Commander and assigned, full-time, active, special duties at Coast Guard Headquarters and informed that such uniforms as might be required would be furnished him. (R. 16, 17, 18) He signed the formal acceptance of enrollment as Lieutenant Commander and the written oath of office.

The respondent accordingly contends that by virtue of the terms of the Coast Guard Reserve Act, Title 14 U. S. C. § 307, 56 Stat. 1021, he became a commissioned officer of the Coast Guard Reserve and was thereby entitled to exclude $1500 from his gross income subject to tax by virtue of Section 22(b) (13) (A) of the Internal Revenue Code, and that he remained in the status of commissioned officer with the privilege of the said exclusion in full force until his disenrollment, under honorable conditions after satisfactory service, on September 15, 1945. (R. 15).

The respondents filed their tax returns in due course for the years 1943 and 1944, claiming the benefit of the said exclusion, but the petitioner sent the respondents a notice of deficiency in the amounts indicated above. The respondents petitioned the Tax Court for relief, but failed to prevail in that tribunal. They appealed to the United States Court of Appeals for the District of Columbia Circuit, which reversed the decision of the Tax Court after a full hearing on the merits. The Commissioner of Internal Revenue successfully petitioned this Court for a writ of certiorari to the Court of Appeals.

The respondent contends that the decision of the Court of Appeals was entirely correct and should be affirmed by this Court.

## SUMMARY OF ARGUMENT.

The decision of the Court of Appeals should be affirmed because, under Sec. 22(b) (13) (A) of the Internal Revenue Code, the respondent was entitled to exclude from his gross income $1500 for both 1943 and 1944 by virtue of his being a commissioned officer of the Coast Guard Reserve, on full-time active duty.

The clear language of the Internal Revenue Code gives him the right to this exclusion, and no hidden or unexpressed intention of Congress can be properly invoked to deny him this right.

The fact that the respondent's pay check was taken from funds originally appropriated for civilian activity of the Coast Guard does not preclude his right to the exclusion since the Internal Revenue Code allows the exclusion to be taken from "compensation received for active duty as a commissioned officer" of the naval forces.

The case of *Mitchell et al. v. Cohen*, 333 U. S. 411, is not controlling, or even persuasive, authority as to the case at bar since the question there involved the rights of an entirely different group of men under an entirely different law. In the *Cohen* case the clear intent of Congress on the

particular issues of that legislation appear in the Congressional Record. No such evidence has been found as to the intent of Congress in relation to the issues of this case, except as that intent appears in the clear language of the Internal Revenue Code.

## ARGUMENT.

There is no doubt that the respondent was a commissioned officer of the Coast Guard Reserve on full-time active duty with the rank of Lieutenant Commander (R. 16), and later Commander (R. 19); that he was subject to military call 24 hours a day (R. 20), that he was subject to full military discipline, including court martial (R. 17), that he had full military authority over officers and men of inferior rank; that he was required to wear his uniform at all times; that he was expected to live up to the rules of military custom and etiquette (R. 30); that he was accorded military privileges not available to civilians (R. 26, 27, 28), such as Ships Service Stores, Franking Privilege, Officers' Mess, Wine Mess, War Ballot, Badges & Medals, Burial in Arlington.

This follows directly the requirements of § 305 of the Coast Guard Reserve Act, 14 U. S. C. 305, which says:

> "Members of the Reserve while engaged on active duty shall be vested with the same power, authority, rights and privileges, as members of the regular Coast Guard of similar ranks, grades, or ratings."

It has been stipulated by the parties that there is only one Coast Guard Reserve and it is composed of regular and temporary members. (R. 15)

**The Petitioner is Entitled to Exclude $1500 From the Compensation He Received During the Years 1943 and 1944, for Active Service Because He Was a Commissioned Officer of the Coast Guard Reserve.**

The respondent was enrolled in the Coast Guard Reserve under the provisions of the Coast Guard Reserve Act of 1941, 14 U. S. C. 307, 56 Stat. 1021, which provides:

> "*The Commandant*, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, *is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe*, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and *such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty*, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, *to define their powers and duties, and to confer upon them such appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.*" (Italics supplied for clarity)

Section 22(b) (13) (A) of the Internal Revenue Code provides:

> Sec. 22. Gross Income
>
> (a) • • •

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(1) * * * (12) * * *

(13) [* * *] *Additional allowance for military and naval personnel.*

"(A) In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, *for active service as a commissioned officer* (or a commissioned warrant officer) *in the military or naval forces of the United States* during such war or in the case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, *so much of such compensation as does not exceed $1,500.*" (Italics supplied for clarity)

It is the respondent's contention that he is entitled to exclude from the compensation he received for his military service, $1,500 for both the years 1943 and 1944. The decision of the Tax Court held that he was not so entitled because he was not a "commissioned officer" and because the pay received was taken from appropriations for civilian activity, thereby making it "civilian" rather than "military" pay. The Coast Guard Reserve Act as quoted above requires that those in the category of the respondent serve "without pay other than the compensation of their civilian positions." But the Court of Appeals was quick to discern that the decision of the Tax Court did not fit the factual situation properly into the language of the statute. Consequently, it reversed the Tax Court's decision.

The Court of Appeals reasoned that the respondent, Connelly, received *as* compensation *for* active military service the pay *of* his civilian position, exactly as the Tax Code and the Coast Guard Reserve Act provide. The Court addressed itself directly to this point with extraordinary clarity:

"To reach the conclusion that petitioner's compensation was not for service in the naval forces, we would

have to hold that he worked full time for no compensation while, at the same time he received full compensation for no work. The facts are that he was engaged in full-time active duty in the naval forces, and he received compensation. We think he received the compensation for the work." — U. S. App. D. C. —, 172 F. 2d 877, 880.

## No Necessity or Occasion for Elaborate "Statutory Construction."

The petitioner is in effect asking this Court to add to the tax statute language which might read, "provided that such compensation is not derived out of funds appropriated for non-military departments or agencies," or "provided such compensation is not the pay of his civilian position." However, no such addition to the statute or interpretation of it is justifiable or intended by Congress. The language of the statute is plain and clear in the ordinary meaning of its words. It does not lead to an absurd or futile conclusion, or to one clearly contrary to the general purpose of the legislation or to public policy.

The language of Mr. Justice Brown in *Hamilton v. Rathbone*, 175 U. S. 414, at page 421 is pertinent:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity." (Italics as in original opinion)

The petitioner devotes a large portion of his argument to the proposition that "compensation received for active service as a commissioned officer" must mean "military pay." It seems almost prophetic that Congress should use the lengthier and more complicated phrase that actually appears in the statute, since by its very terms, it clearly allows the respondent, Connelly, to take the $1,500 exclusion

whereas had the simpler and shorter phrase been enacted into law, there might have been room for doubt.

The petitioner goes into elaborate research and discussion of various statements by witnesses before legislative committees and on the floor of Congress in the hope of proving that "compensation received for active service as a commissioned officer" should be deemed synonymous with "military pay," and that the statute should be so interpreted by this Court. But the argument falls when it is realized that *nowhere* in any of the discussions skirting the particular question at bar *was the situation of this particular, small group of officers directly considered.* In no other instance that the respondent has been able to discover, among the innumerable classifications of officers and enlisted men in the military establishment as a whole, has the law provided that an officer shall serve "without pay other than the compensation of their civilian positions." In short, the respondent's situation was unique and the legislators did not have his particular case in mind when considering the language to be enacted into law, and therefore, the petitioner's position, that his construction of the statute is supported and required by its legislative history, is untenable.

The plea of unexpressed legislative intention is not new, and its limitations are well known. The Court of Appeals followed precisely the rules so well established by this Court when it said:

> "We are urged to ascertain an unexpressed intendment in the revenue act. The language of that act is direct and unadorned. It grants an allowance 'In the case of compensation received . . . for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war'. If Commander Connelly fits those clear requirements, he is entitled to the allowance. We think that no hindsight, subtlety or assumed mental reservation on the part of Congress should deprive him of it." 172 F. 2d 877, 880.

It is curious to note, and probably significant, that the petitioner has apparently abandoned the argument that the respondent, Connelly, was not a "commissioned officer" in spite of the fact that the Tax Court agreed with him on that point. (R. 40) The petitioner is now drawing away from the argument as to the significance of the respondent's "military status," and contending that it is of no importance in arriving at a proper decision in this case, on the authority of *Mitchell v. Cohen, supra*. As will be more fully developed in the discussion of that case following in this brief, the *Cohen* case cannot be considered as authority for that proposition.

Thus, the petitioner is left with one final argument, the entirely novel idea that the "Taxpayer received no compensation 'for active service as a commissioned officer;' his compensation came solely from his civilian position with the Coast Guard which he continued to hold." (Pet. Brief 27)

The facts in the record, as stipulated by the parties and adduced by the uncontradicted testimony of Connelly himself, who was the only witness to appear, clearly indicate that he devoted his entire effort, full-time, to his job in the legal division of Coast Guard Headquarters. (R. 14, 16, 20) He joined the Reserve only after being directly urged to do so, and upon the commencement of his duties in uniform considered himself to be performing military functions and military duty. (R. 24) His conclusions on this point were entirely correct in the light of the terms of his enrollment. (R. 16, 17) The fact of the matter is that the War changed the respondent, Connelly's, job from a civilian to a military job. Connelly's personal history gives the clearest indication that the Coast Guard recognized that fact and took appropriate action by changing him from a civilian to a military man.

## Decision to Change Respondent's Status a Purely Administrative Matter.

No point of law is better settled than that the judiciary will refrain from reviewing matters of internal administration of executive agencies, unless there should be involved a question of unconstitutionality or the violation of a statute. The decision to change Connelly's status from civilian to military was clearly within the scope of authority of the Commandant of the Coast Guard (14 U. S. C. 307, 56 Stat. 1021) and the fact that it carried with it certain implications as to tax liability does not bring it within the category of decision which the Courts will review. The Court of Appeals took this position and explained why it did so.

> "We do not see how similarity of duties can erase the distinction between civilian and military service. If it be attempted, an appalling confusion would arise. All sorts of questions would be presented as to the thousands of industrialists who were inducted or commissioned and assigned to operate plants, or to command patrol boats, and as to military personnel on duty at the Pentagon, and as to quartermaster and supply corps personnel dealing in clothing and equipment, and so on *ad infinitum*. We do not know why the Executive Department of the Government chose to translate each of scores of civilian operations into military and naval operations for the conduct of the war; and to induct into the military and naval services the accompanying personnel. And it is not our function to inquire why, although common sense indicates that total war is best conducted by military methods, means and men throughout. We know that it was done, and that is sufficient for our purposes. * * * *
>
> When, for purposes of war, the Executive Department translates civilian duties into military duties and inducts personnel from civilian status to military status, and when Congress enacts legislation applying to military duties and military personnel, without further definition, the courts should simply accept those determinations. In such cases, the courts, in our view, should simply apply the long-established criteria—

oath of office, military duty, and subjection to military discipline." 172 F. 2d 877, 879.

There can be no dispute that the respondent took on a military status at the time he took his oath. On this point, Mr. Justice Douglas said in *Billings* v. *Truesdell*, 321 U. S. 542 at page 559:

> "* * * a selectee becomes 'actually inducted' within the meaning of § 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."

Although the question in that case was primarily the *time* when military status attached, it is submitted that this opinion is also authority for the collateral proposition, that military status actually attaches to an officer of the Coast Guard Reserve after the Commandant has found him acceptable for service and he undergoes whatever ceremony or requirements of admission the Coast Guard has prescribed.

## Respondent's Status of Primary Importance.

Despite the learned brief submitted on behalf of the Commissioner of Internal Revenue, and in direct opposition thereto, the respondent, Connelly, contends that his status, as a commissioned officer in the naval forces of the United States, is the very cornerstone of the whole situation. To say that this "Court unmistakably held in *Cohen* that the question of 'status' was beside the point" (Pet's. Brief, 17, 18), is entirely unwarranted and completely fallacious. As pointed out more fully later in this brief, the Court in effect held that Cohen's peculiar situation and the particular language of the statute under consideration in that case warranted a search beyond the dictionary definition of "ex-service men" to determine whether Congress intended men in Cohen's situation to have the benefits of

the Veteran's Preference Act, and in so holding, it was necessarily decided that in questions of the nature of the *Cohen* case, the status of Cohen might not be the sole determinant in the case. It is definitely *not a fact* that by its decision in the *Cohen* case this Court held that "The standard of military 'status' had been explicitly cast aside." (Pet. Brief 49) The Court's attention in the *Cohen* case was directed solely to the Veteran's Preference Act of 1944, which has nothing to do with the questions at bar, which arise under the Internal Revenue Code.

**Sacrifice Not Prerequisite to Right to Exclusion.**

On the question of benefit received, the petitioner takes the position, apparently, that war service must cause some pecuniary sacrifice to the individual concerned in order for him to fall within the class entitled to the $1,500 exclusion. (Pet. Brief 19, 20, 21) The fallacy of that argument readily appears upon even the most cursory reading of the statute, and when the situation of the regular career officer, Army, Navy or Coast Guard, is recalled, it can be demonstrated that far from a sacrifice, the War-inspired exclusion actually amounted to a raise in pay for them. No one, however, has so far questioned their right to the exclusion. It would have been so easy for Congress to make *sacrifice* the criterion for the exclusion, or even its dollar for dollar measure, that the fact that they did not do so can mean only that they did not *intend* to do so. Congress instead made the receipt of "compensation for active duty as a commissioned officer of the naval forces" the criterion. Therefore, the respondent's pay during the period in question, for the work he did, being compensation for his service entitles him to take the exclusion.

Apart from and beside all the arguments above, it is further respectfully submitted that respondent did suffer an economic hardship by reason of his service. He was an expert in maritime legal affairs, and in a civilian status he was free to accept employment outside the government

service at any salary he could bargain to get, or in the government service, with any other agency needing men of his qualifications, from which he might have been able to obtain a higher civil service rating. The United States Coast Guard, it is fair to assume, was advertent to this situation, and in prevailing upon him to enter the Reserve, it froze him in the position he held and availed itself of his ability and experience, by making him an officer subject to all military orders and discipline. This is quite different from the situation applicable to Cohen, who was a War Department economist, who was at libery to take any position he pleased at all times, and regardless of his intermittent military status in the Coast Guard Reserve.

## The Double Negative.

The petitioner seems to have become confused by the double negative in the language of the Coast Guard Reserve Act, 14 U. S. C. 307, that is to say: "*without* pay *other than* the compensation of their civilian positions." Turning the double negative into its resultant affirmative it would read; "with the pay of their civilian positions but without other pay." When read in that fashion, the phrase clearly demonstrates that it is present in the Act for the sole purpose of fixing the *rate of pay* of those persons affected by it. Two reasons for such language are self evident. Congress did not want those in the respondent's class to be drawing double pay, civilian and military, and at the same time, did want to assure them that their income would remain stable at the level to which they had presumably become accustomed. In other words, while their jobs and their personal status had been changed by the War from civilian to military, their pay would remain the same. That the petitioner agrees with the respondent on this point is indicated on page 28 of his brief, where he says:

> "The critical language of Section 22(b) (13) (A) ['compensation received * * * for active service as a commissioned officer * * *'] we think plainly means the amount paid to the taxpayer for service as an officer."

However, the respondent is unable to agree that from that fact can be derived the proposition that the compensation must be "military pay" in order to entitle the taxpayer to the exclusion. *Nowhere in the statute does the phrase "military pay" appear.*

## Privileges of Rank Not Controlling.

There is nothing illogical or contradictory in the fact that some of the privileges of officers of other classifications in the Coast Guard were withheld from the men in the respondent's classification, or that certain privileges of their former civilian status were not cut off when they enrolled in the Reserve. Any number of differences in privilege occur between Regular Officers of the Coast Guard and Reserve Officers, but that makes the latter none the less Officers of the Coast Guard. So also, there were numerous differences between the privileges available to permanent members of the Reserve and temporary members. Similarly that cannot be said to deprive Connelly of his membership in the Reserve. In fact, probably the greatest differences of all occurred among the six different classes of temporary members of the Reserve as pointed out in the *Cohen* opinion, *supra*. See footnote 6 on page 413.

The fact that some civilian attributes and privileges remained with the respondent after he took up his military status reflects what was undoubtedly the belief of the Coast Guard authorities, that when the War was over the natural characteristics of such jobs as the respondent, Connelly's, could normally be expected to revert back to civilian, and it was not unreasonable to expect many of the temporary members of the Reserve to go back to their same old jobs again, as civilians in the civil service. Thus, the disturbance of the continuity of the respondent's civil service record was held to a minimum.

## The Cohen Case.

In spite of the foregoing, the petitioner contends that the Court of Appeals was wrong in not denying the respondent the right to exclude $1,500 of his pay from gross taxable income, saying that the decision of this Court in *Mitchell* v. *Cohen*, 333 U. S. 411, precludes the respondent from his rights under Section 22(b) (13) (A) of the Internal Revenue Code. The pertinent clauses of that section are repeated for convenience:

> "Additional allowance for military and naval personnel. (A) In the case of compensation received * * * for active service as a commissioned officer * * * in the military or naval forces of the United States during such war * * *, so much of such compensation as does not exceed $1,500."

The *Cohen* case had no tax implications whatsoever, but was concerned solely with whether a man in the Volunteer Port Security Force (another of the six different classes of temporary membership in the Coast Guard Reserve) was entitled to the rights of an "ex-serviceman" under the Veterans' Preference Act of 1944. In contrast to the full time active military duty the respondent, Connelly, performed for about two and a half years, Cohen never gave up his civilian job as an economist in the War Department, was required to put in a minimum of only 12 hours a week on duty, was in a military status *only* when actually on duty, continued to draw full pay for his regular work as a civilian economist, drew no pay whatsoever for his part-time military duty, and in fact, put in total service of only 398 *hours*. 333 U. S. 411, 415.

In view of the non-technical word, "ex-serviceman", having been used in the Veterans' Preference Act, this Court found it necessary to go beyond the Act itself for its true meaning. Search revealed that Congress had treated this *very question* as to this *particular group* of men in its deliberations on an Amendment to the Act. (Note: Congress did

not treat the particular group which included the respondent, Connelly, when enacting the Tax statute.) The House passed the amending bill, and the Senate Committee on Civil Service reported the bill favorably, but the Senate later adjourned without considering the bill. In a footnote to the decision, 333 U. S. 411, 421, the following appears:

> "The proponents of the bill and the two committees considered it as a clarification of the original Congressional intent as to the meaning of 'ex-servicemen.' It was stated that the country owes a debt of gratitude to the temporary Coast Guard Reservists, *'but they are not to be classed as ex-servicemen,* who were actually uprooted from their civilian occupations and subjected to the rigors of full-time military training and combat. It is to the latter group that Congress intended to provide employment preference in Government service.' 93 Cong. Rec. 7315." (italics supplied)

Mr. Justice Murphy recognized the foregoing as an expression of Congressional intent on the very question before him and wrote his opinion accordingly.

However, the impact of the *Cohen* case was meant to be felt by the "Force" (the Volunteer Port Security Force) since over and over again the word "Force" is used in the opinion to designate the group with which that case was concerned. There is no indication that the *Cohen* opinion was even meant to settle the rights of men in the position of the respondent, Connelly, under the Veterans' Preference Act, much less under the Internal Revenue Code.

But it is in matters of fact that Cohen's situation, both personal and legal, is so vastly different from the respondent, Connelly's. For instance, Cohen would have been subject to arrest by civilian police and prosecution by the District Attorney if he had worn his uniform to work: Connelly would have been subject to court martial if he had *not*. (See 333 U. S. 411, 414, and R. 24) Cohen's government pay check was for his work at his civilian job as a War Department economist. Connelly's government pay

check was for his work at his military job in Coast Guard Headquarters. No such decision was ever made by the War Department authorities changing Cohen's job from civilian to military. Cohen's military work consumed only his hours off work from his civilian job. Connelly had no such hours available by virtue of his being on full-time active duty.

It is thus abundantly clear that the Court of Appeals properly distinguished the case at bar from the *Cohen* case.

**Petitioner's Conjectures as to Facts Not in the Record.**

On page 7 of the petitioner's brief appears the following statement:

> "He (referring to the respondent, Connelly) probably could resign for his 'own convenience' and could not be transferred without his permission."

There is absolutely nothing whatsoever in the record to support either of the two quoted conjectures and they should therefore be given no consideration by the Court in arriving at its decision. Furthermore, if the petitioner should insist on making an issue of fact on those two points, a new trial will have to be held to resolve the issues. If such a trial were to be held, the respondent is prepared to offer testimony on both issues.

As to the first issue he would testify that he was called before three different admirals when he earnestly tried to resign, that his requests were not granted and he was ultimately persuaded to cease his efforts to resign.

As to the second issue, he would be prepared to offer documentary evidence that at least one other officer in his category was sent to Europe under orders during wartime without having an opportunity to express himself at all, much less give his permission.

Instead of pressing for a new trial on these relatively unimportant issues, the respondent respectfully suggests that they be given no consideration by the Court.

## Appendix B of Petitioner's Brief

The respondent respectfully and reluctantly invites the attention of the Court to the fact that the first four of the six documents included in Appendix B of the petitioner's brief are not part of the record of this case. The last two documents in the Appendix were regularly offered and admitted in evidence before the Tax Court, thereby becoming a proper part of the record of the case.

The four documents are represented to be:

1. Commandant's Circular 5-46 dated January 22, 1946, beginning at page 47 of petitioner's brief.

2. Memorandum for Chiefs of Officers and Divisions at HQ, dated March 10, 1944, signed by the Commandant, beginning on page 57 of petitioner's brief.

3. Personnel Circular 16-48, dated April 20, 1948, beginning at page 59 of petitioner's brief.

4. Personnel Bulletin 75-45 dated August 8, 1945, beginning on page 61 of petitioner's brief.

None of the six documents in Appendix B purport to be matters of which this, or any other, Court would take judicial notice. As to the first four documents, there has not even been afforded the respondent the opportunity of questioning their authenticity, much less their materiality or relevance to the issues of the trial. In fact, the third document listed above is dated *after the hearing of this case in the Court of Appeals.*

In view of the foregoing, the respondent respectfully suggests that the Court give no consideration to the four documents listed above, or weight to any argument which is based therein.

The only allusion to an appendix in the rules of this Court is in Rule 27 where the following statement appears: "If the statutes are long they should be set out in an appendix." Statutes comprise no part of petitioner's Appendix B.

## CONCLUSION.

The decision of the Court of Appeals is entirely correct and should be affirmed.

Respectfully submitted,

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